

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANTS
AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

*United States Court of Appeals
For the
District of Columbia Circuit*

No. 13,756

FILED MAY 17 1957

ROBERT E. HAYCOCK, JR., and
STANDARD FLOORS, INC.,

Joseph W. Stewart
CLERK

Appellants

v.

RICHARD B. CHRISTIE,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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STATEMENT OF QUESTIONS PRESENTED

In the opinion of the appellants, the questions are:

1. Whether the trial Court abused its discretion in denying appellants motion for a new trial upon the following:
 - a. That the verdict was grossly excessive, unconscionable and one which should have shocked the conscience of the Court.
 - b. The verdict was contrary to the evidence, the weight of the evidence, and to law.
2. Whether the Trial Court abused its discretion in denying appellants motion for a new trial, and committed error, when the Trial Court permitted counsel for appellee in addressing the jury, to use the blackboard in exhibiting to the jury, items and amounts of damages which had not been introduced or established in evidence and which were strictly speculative and without foundation in evidence, after the Trial Court, upon request of counsel for the appellants, had instructed counsel for appellee not to so use the blackboard, and counsel for appellants had objected to such use of the blackboard.
3. Whether the trial Court abused its discretion in denying appellants motion for a new trial after the Trial Court, in the handling of the jury, instructed the jury that if it did not arrive at a verdict by 6:30 p.m. on Friday evening, the jury would have to report on the case at 10:00 a.m. on the next day, a Saturday.
4. Whether the Trial Court abused its discretion in denying appellants motion for a new trial by the use of a remittitur in connection therewith.

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Appellants

v.

RICHARD B. CHRISTIE,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANTS

JURISDICTIONAL STATEMENT

This is an appeal in an action which was instituted in the United States District Court for the District of Columbia by appellee seeking recovery for damages resulting from alleged permanent physical injuries. Jurisdiction of the District Court was founded upon the provisions of Title 11, Sec. 305 and 306 of the Code of Laws of the District of Columbia, 1951 Edition.

After trial and denial of a motion for a new trial final judgment was entered in favor of plaintiff for \$17,500.00. Defendants (appellants here) appeal. Jurisdiction of this Court is founded upon the provision of Title 28, Sec. 1291, United States Code.

STATEMENT OF THE CASE

This is an appeal taken from a final judgment for appellee in the United States District Court for the District of Columbia which denied a motion for a new trial upon the filing of a remittitur by appellee (Joint App. 9, 10).

In his complaint, appellee alleged that on June 8, 1954 while walking on the sidewalk of Wisconsin Avenue, N.W., Washington, D.C. he was struck and run over by a motor vehicle owned by appellant Standard Floors, Inc. and operated in a negligent and careless manner by appellant, Robert E. Haycock, Jr., employee agent of appellant Corporation; as a result of the accident he sustained severe injuries to his legs causing shock, mental anguish, pain and suffering and permanent physical injuries; as a result of these injuries he had been disabled and prevented from engaging in his normal profession as a college professor, or any gainful profession, and had suffered complete loss of earnings which he would continue to suffer in the future, and he had been and would be caused to expend large sums of money for medical care and hospital treatment (Joint App. 1, 2).

In their answers, appellants admitted the occurrence of the accident, ownership of the vehicle and employment of appellant Haycock; denied negligent and careless operation of the vehicle; avered they were without knowledge or information sufficient to form a belief as to the truth of the allegations concerning injuries, losses, expenses and damages; and set up the defenses of sole and contributory negligence (Joint App. 2-3).

Pretrial statements were filed (Joint App. 4-5) and the pretrial proceedings adopted the pretrial statements of the parties (Joint App. 4).

As the evidence during the trial was extensive, and all material portions of the transcript of the testimony are included in the joint

appendix. (Joint App. 12-79), and references have been made in the argument to specific portions of the testimony in the joint appendix, it is not considered practical to enlarge this statement of the case by further reference to specific portions of the testimony.

By his testimony (Joint App. 12-43) appellee claimed that the truck ran over both of his legs; he was taken by the truck to Georgetown Hospital where he remained for one month; he was teaching advertising at American University at the time under a contract for the fall-spring session, 1953-1954, at a salary of \$3,450 per annum; for one and one-half months after leaving the hospital he had to use crutches and a cane in getting around, with difficulty; there was pain and suffering from an ulcer on one of his legs; as early as March, 1954 he had started to seek employment elsewhere and he continued seeking employment after the accident; in seeking employment he had placed an advertisement in a magazine of national circulation and corresponded with in excess of 72 colleges, universities and business organizations in this country and abroad, and had personal contacts with some of them; the accident had caused him to suffer loss of employment in the summer school of American University and other employment that he could have obtained in Maine, both during the summer of 1954, and prevented him from getting employment until January 1956; the stress, strain and worry over his financial condition resulted in his having a duodenal ulcer during the fall of 1955; the accident resulted in his hospital and medical expenses pertaining to his legs, and his duodenal ulcer, and loss of employment from the date of the accident henceforth. Appellee's orthopedic physician testified that as a result of the accident there were no fractures, no injuries to the bones, no injuries to the ligaments, but there was injury to the soft tissues of his legs, with a skin ulcer on one leg; he could not give any percentage of disability of appellee; the shock suffered by appellee endured only for the day of the accident; and appellee could have resumed teaching during

November or December, 1954. (Joint App. 44-53). Appellee's internist testified that historically the injuries to the legs resulting from the accident did not cause the duodenal ulcer; that from the history given to him by appellee he presumed that the duodenal ulcer was caused by appellee's worrying over his financial condition; that he did not know what caused the duodenal ulcer; that he did not know appellee was employed when he examined him just before the trial; and that if appellee felt that he had security in his employment of 1956 that might be beneficial to appellee's condition (Joint App. 53-70).

As this appeal is not on the issue of liability but is on the phases set forth in the statement of points, no references are made to liability.

Appellant's orthopedic physician testified that during two examinations of appellee he discovered many degenerative conditions that existed prior to the accident; as a result of the accident there were no fractures but there were contusions and a skin ulcer on one leg; there was some disability but that appellee could have resumed teaching in November or December, 1954; the ulcer on the leg had healed when he had examined appellee just before the trial; and the lack of circulation in appellee's body was due to degenerative conditions and his age (Joint App. 70-74).

Dr. Bentley, Professor Emeritus of American University, testified that he conferred with applicants for positions at American University when appellee was there and appellee had informed him that he was seeking a position elsewhere; applicants for teaching positions apply well in advance of September in each year to get teaching positions; but Dr. Bentley did not testify concerning any summer school classes at American University during the summer of 1954, in appellee's subjects, nor did he testify of any contract or commitments that appellee had with American University concerning teaching in the summer school in 1954 (Joint App. 77-79).

Mrs. MacDonald in testifying for appellee stated that she and her husband were his friends and observed his pain and suffering and difficulty in getting around after the accident during the one and one-half months after he left the hospital, and that they had taken him around with them in their automobile on numerous occasions (Joint App. 74-76).

Appellee claimed in his testimony (Joint App. 12-43) that the accident further caused him to lose a position with Texas University at Austin but appellant's Exhibit No. 3 disclosed that the University had filled the position with an individual of its choice.

Prior to counsel for appellee summarizing his case to the jury, counsel for appellants objected to his using the blackboard to display any figures pertaining to damages. The Court overruled this objection whereupon counsel for appellants requested that counsel for appellee be permitted to use the blackboard for figures only to the extent of the figures in evidence. This request was granted and the trial court further instructed counsel for appellee that he could not use the blackboard in drawing upon their imagination or otherwise. (Joint App. 79-80). During summation to the jury by counsel for appellee counsel for appellants objected to certain items being placed on the blackboard but nevertheless the trial court permitted these items and other items to be placed on the blackboard, which counsel for appellants contended were speculative, imaginary, and not supported by the evidence (Joint App. 81-82).

At 3:45 p. m. on Friday, November 30, 1956, the case was given to the jury. The trial court called the jury back into the courtroom at 6:00 p. m. and instructed the jury that it was going to excuse them for the day but that they should return at 10:00 a. m. the next morning, Saturday, December 1, 1956, unless the foreman thought there was a likelihood the jury could arrive at a verdict in another one-half hour. The foreman of the jury replied that he thought it was worth trying, and the jury again retired on the case (Joint App. 86, 87).

At 6:30 p. m., Friday, November 30, 1956, the jury returned their verdict for appellee for \$25,000.00 (Joint App. 6).

Thereafter appellants filed their motion for directed verdict and/or for a new trial (Joint App. 7-9). After hearing thereon, the trial court issued its order denying the motion for directed verdict and providing that if within ten days appellee filed a remittitur of that part of the judgment in excess of \$17,500.00 the motion for a new trial would be denied (Joint App. 9-10). Appellee filed such a remittitur (Joint App. 10).

This appeal on the denial of the motion for a new trial followed.

STATEMENT OF POINTS

1. The verdict of twenty-five thousand dollars was grossly excessive, unconscionable, and should have shocked the conscience of the trial court beyond the use of a remittitur and to such an extent that a complete new trial should have been awarded.

2. The verdict was contrary to the evidences.

3. The trial court should not have permitted counsel for appellee, in addressing the jury, to exceed his authority in using the blackboard in exhibiting to the jury items and amounts of damages which had not been introduced or established in evidence and which were strictly speculative and without foundation in the evidence especially because counsel for the appellants had previously objected to such use of the blackboard and the trial court had sustained the objection and instructed counsel for the appellee as to the exact extent he could use the blackboard.

4. The trial court did not handle the jury properly in informing the jury that if a verdict was not arrived at by 6:30 p. m. Friday, November 30, 1956, the jury would have to report back on the case on Saturday, December 1, 1956.

SUMMARY OF ARGUMENT

1. The verdict of \$25,000.00 was grossly excessive and unconscionable, and should have shocked the conscience of the trial court beyond the use of a remittitur and to such extent that a complete new trial should have been awarded and, the verdict was contrary to the evidence.

a. Loss of Earnings

The accident did not cause any loss of earnings. The evidence established that appellee had been employed as a teacher less than one-half of the years of his employment. Furthermore, the evidence established that as early as March, 1954, (accident occurred on June 8, 1954), appellee had informed American University that he was not going to teach there in September, 1954 and that he was seeking employment elsewhere. The evidence established that before and after the accident appellee had, in seeking employment as a teacher and otherwise, inserted an advertisement in a magazine of national circulation and corresponded with and had personal contacts with in excess of 72 colleges, universities and organizations, and that he was not successful in getting a position anywhere until January, 1956. Although appellee claimed he had a prospect of getting summer employment in Maine and summer employment as a teacher in the summer school at American University, during the summer of 1954, and a teaching assignment at Texas University at Austin for the academic year 1954-5, the evidence did not disclose that he received any commitment from or had any contract, even tentative, for such employment. Nor did the evidence disclose what compensation he would have received from such claimed possible employment. Accordingly, the jury, in awarding appellee damages for claimed loss from employment engaged in passion, emotions, and prejudice, with a result that its verdict was grossly excessive, unconscionable, contrary to the evidence, and one which should have shocked the conscience of the trial court to such extent that a complete new trial should have been awarded.

The case law applicable dictates that a remittitur should not have been used, but to the contrary, it was the duty of the trial court to award a complete new trial, because the verdict was excessive, unconscionable and the result of passion, emotions and prejudice.

b. Medical Expenses, Damages To Suit And Eyeglasses

According to the evidence, the only medical expenses and other damages attributable to the accident were the following: Georgetown University Hospital bill in the amount of \$420.70, the bill of appellee's orthopedic physician, Dr. Rush, in the amount \$325.00; and damage to appellee's suit and eyeglasses in the total amount of \$115.00. Appellee was not entitled to full damages for his suit and eyeglasses because the suit had been used and the eyeglasses were not broken; as a matter of fact, appellee was using these eyeglasses at time of trial. Appellee was not entitled to his claimed expense of \$140.00 for use of taxicabs because the evidence established that his friends had transported him on numerous occasions during the one and one-half months after he left the hospital.

c. Claimed Expenses Resulting From Duodenal Ulcer

According to the evidence the duodenal ulcer did not result from nor was it connected with the accident. Appellee's local internist, Dr. Sullivan, the only witness produced by appellee to testify concerning the duodenal ulcer, established through his testimony that the accident had no causal relation to the duodenal ulcer. He further testified that the history concerning the ulcer which he had, was given to him by appellee. He did not treat appellee for that ulcer as appellee's hospitalization and treatment thereon occurred in Florida. Dr. Sullivan testified that he did not know what caused the ulcer but presumed that it was because of worry and stress and strain on the part of appellee. Furthermore, from the evidence, the first symptoms of the duodenal

ulcer occurred during October or November of 1955, more than one year after the accident. The jury, in awarding expenses for pain and suffering for the duodenal ulcer again engaged in passion, emotions and prejudice, and disregarded the evidence.

d. Entire Medical Aspect

The evidence established that as a result of the accident appellee had no fractures of his legs, no damage to the bone structure or supporting ligaments but merely damage to the soft tissues of his legs with a non-serious type of skin ulcer on one leg which did not heal as quickly as his orthopedic physician had expected because of lack of circulation. Through testimony of appellant's orthopedic physician, the evidence confirmed the above and further disclosed that appellee had, even before the accident, many degenerative conditions because of his age. This was not refuted in any of the evidence. Both orthopedic physicians testified, and therefore established medically, that appellee could have resumed his work as a teacher during November or December, 1954. This was about 6 months after the accident. Appellee's orthopedic physician testified that the shock which appellee received from the accident was of a duration of only the day of the accident. Appellee's internist, in testifying about the duodenal ulcer did not establish that the ulcer resulted from the accident or that it had any causal relationship to the ulcer. This internist testified that he did not know what caused the ulcer but presumed from the history given him by the appellee that the ulcer was caused by stress and strain or emotions on the part of the appellee. The jury should not have held that the duodenal ulcer resulted from the accident or that expenses and pain and suffering attributable to it were caused by the accident, for in thus holding, again the jury engaged in passion, emotions and prejudice.

e. Use Of Remittitur

The authorities cited herein dictate that a trial court should not use a remittitur when a verdict is excessive, unconscionable and the

result of passion, emotions and prejudice, and that under such circumstances it is the duty of an Appellate Court to set aside the verdict and grant a new trial.

2. After authorizing and instructing counsel for appellee as to his use of the blackboard in his summation to the jury, the trial court should not have, over objection of counsel for appellants, permitted counsel for appellee to use the blackboard beyond such instructions.

Portions of the transcript of the proceedings set forth herein disclose that although the trial court permitted counsel for appellee to use the blackboard in his summation, the trial court specifically instructed counsel for appellee as to the extent he could use the blackboard. The transcript of the proceedings further discloses that during counsel for appellee's use of the blackboard counsel for appellants objected to such use when counsel for appellee went without his authority at the blackboard. Nevertheless, the trial court did not sustain such objections and thus permitted full use of the blackboard, beyond the instructions which had been given counsel for appellee. This was disastrous to appellant's case because it appears obvious that the jury completely accepted the total of \$19,300.00 displayed on the blackboard by counsel for appellee, and added to it an attorney's fee to the total result of a grossly excessive, unconscionable verdict of \$25,000.00.

a. The items which should have been exhibited on the blackboard in accordance with instructions of the trial court were:

Bill of Georgetown Hospital	\$420.70
Bill of Dr. Rush, Appellee's Orthopedic Physician	325.00
Cost of suit of clothes	80.00
Cost of Eyeglasses	35.00
	\$860.70

Surely the \$140.00 claimed for taxi fares should not have been displayed on the blackboard as this was speculative because appellee's witness had testified that she and her husband had transported him in their automobile on numerous occasions. Even though the cost of the suit and eyeglasses were exhibited on the blackboard, the jury should not have awarded full value for these items, or for the taxicab fares.

b. Items Displayed on the Blackboard Beyond the Scope of Instructions By the Trial Court.

The trial court should not have permitted counsel for appellee to exceed his authority, and the instructions of the court, in placing the following items on the blackboard as the effect on the jury was monumental and directly contributed to the jury engaging in the wildest of speculation and imagination:

\$1,000 for claimed loss from the summer job

\$4,500 for loss from a claimed teaching position for the academic year 1954-5 (\$4,500 made up of \$3,400 plus \$1,000 for summer school)

\$2,000 for 6 years, involving future employment until appellee is 70 making grand total of \$29,300, which was corrected at request of counsel for appellants to \$19,300.

None of these amounts were established by the evidence. All of these amounts were speculative and imaginary. There was no evidence that appellee could have gotten employment from a time before the accident until he got employment in January, 1956. The evidence did establish that although appellee had advertised for employment in a magazine of national circulation and had corresponded and personally contacted in excess of 72 colleges, universities and organizations, he just could not and did not get employment, accident or no accident. The accident did not result in loss of employment because the evidence disclosed that appellee could have again engaged in the work of teaching as early as November or December of 1954 and appellee testified that he did not

mention his physical injuries in any of his correspondence or personal contacts seeking a position.

However, the jury did disregard the evidence, and engaged in passion, emotions and prejudice and awarded appellee all of the damages displayed on the blackboard, and more. This was a direct result of unauthorized use of the blackboard, to complete prejudice against appellants.

3. The trial court did not handle the jury properly in instructing that it would have to return on the case on a Saturday morning, December 1, 1956.

The portion of the transcript set forth herein pertaining to this item discloses that the trial court called the jury back into the court room at 6:00 p. m., November 30, 1956, and upon then ascertaining that the jury had not arrived at a verdict the trial court instructed the jury that it could have another thirty minutes or until 6:30 p. m. to further consider the case, but that if there was no verdict by that time the jury would be excused and required to report back on the case the next morning, Saturday, December 1, 1956. When thus informed the foreman of the jury indicated that he thought further deliberation until 6:30 p. m. on that Friday evening would be worth trying. At 6:30 p. m., the jury returned to the court room and rendered its verdict. It is earnestly and most respectfully submitted that the trial court erred in thus handling the jury. This was not a criminal case. The trial court could have excused the jury until the next Monday morning. It is common knowledge that Saturdays are prevalently non working days in this City where there is predominantly Government employment. Because of this, individuals either have plans for the use of Saturdays, or have made commitments, or in many instances intend to be out of town. There appears no doubt but that the jury, faced with the instruction that if it did not arrive at a verdict by 6:30 p. m., it would have to report again on the case on Saturday, December 1, 1956, became careless, and hurriedly and improperly arrived at a grossly excessive and unconscionable verdict.

It is respectfully requested that the judgment appealed from be reversed and the case be remanded for a complete new trial because the verdict was grossly excessive, unconscionable, contrary to the evidence, and a remittitur should not have been used, and the trial court erred in permitting counsel for appellee to thus use the blackboard, and the trial court further erred in the handling of the jury.

ARGUMENT

I.

The Verdict of \$25,000 was Grossly Excessive and Unconscionable, and Should Have Shocked the Conscience of the Trial Court Beyond The Use of a Remittitur And to Such an Extent That a Complete New Trial Should Have Been Awarded and, in Addition, The Verdict Was Contrary to the Evidence.

A. Loss of Earnings

Appellee testified with reference to his educational background and previous employment, in substance, as follows: Graduated from Yale University in 1914; his first position thereafter was as teacher of Mathematics and English at Portland Academy, Portland, Oregon, for a period of three years; he thereafter served two years in the Navy; he then became employed in the advertising business for about 25 years, holding positions with various organizations until he became account executive with one concern and publicity and public relations man with another concern; he was employed as an advertising man by Guaranty Trust Company of New York from 1929 to 1945 with a salary from \$5,000 to \$7,000 per annum with bonus; thereafter he obtained a teaching position at Kent State University teaching Advertising, Marketing and Marketing Research with a starting salary of \$4800 per year; when he

left Kent University he was making \$5600 per year and his salary at Kent University included teaching in summer school; he left Kent University to take a position at American University, Washington, D.C. in September, 1953, and he was with American University until June, 1954 when the accident occurred (Joint App. 12-14).

Appellee's contract with American University disclosed that he was engaged by that University as an Assistant Professor of Advertising at a salary of \$3450 for service during the fall and spring sessions, 1953-1954 for a period September 15, 1953 to June 30, 1954, and such appointment became effective as of September 15, 1953, (Joint App. 29).

In a portion of appellee's deposition, which was used in evidence, he testified that as early as March in 1954 he had told American University that he was not going to teach there in September, 1954 (Joint App. 30). With reference to appellee's claim for loss of earnings from teaching in summer school at American University, he testified that he did not have any definite commitment that he could get classes in the summer school of American University during the year 1954 nor did he know how much he would be paid for summer school employment (Joint App. 36-37).

Appellee claimed that the accident prevented him from getting employment thereafter until early in the year 1956. As evidence to establish this claim, he stated that he placed an advertisement in the American Association of University Professors Bulletin seeking employment (Joint App. 38), and corresponded with and made calls upon in excess of 72 colleges, universities and organizations, both in this country and in foreign countries seeking employment (Joint App. 39-40) and that he had made such inquiries for employment before and after the accident (Joint App. 32). Attention is invited to

appellant's Exhibit No. 2 wherein it is disclosed that appellee started corresponding in seeking a position as early as March, 1954, and also appellee's testimony that he had written such letters as early as that date (Joint App. 32, 41-42). The accident occurred June 8, 1954. Appellee further testified that as early as March, 1954 he had corresponded with Texas University at Austin seeking a position (Joint App. 20) and that he had informed American University as early as March 1954 that he was thinking of getting a position elsewhere (Joint App. 30). The fact that appellee was seeking to leave American University in 1954 was confirmed by Dr. Bentley of American University (Joint App. 77). With reference to Texas University at Austin, attention is invited to Appellant's Exhibit No. 3 wherein is disclosed that Texas University had filled a vacancy there with a local individual of choice. For convenience this exhibit is set forth herein:

AGRICULTURE AND MECHANICS COLLEGE OF
TEXAS
College Station, Texas

June 25, 1954

Department of
Business Administration

Mr. Richard B. Christie
3130 Wisconsin Avenue, N.W.
Washington, D.C.

Dear Mr. Christie:

Please excuse the delay in answering your letter of April 10. Your application was still under consideration, and I wanted to reach a final decision with respect to the appointment before writing you.

We have made an offer to a man in this area which has been accepted. Although we have no vacancy now, I shall keep you in mind if a vacancy develops in the near future.

Sincerely,

T. W. Leland
Head

TWL:dc

Despite this, appellee testified that although he did not have anything definite from any college or university at the time of the accident, he thought he might get a position with Texas University at Austin because he had a friend who taught there who thought that University might employ him (Joint App. 33). Although appellee claimed that the injuries resulting from the accident prevented him from getting employment after expiration of his contract with American University, he testified that he did not mention any physical disability on his part in any of his correspondence seeking employment (Joint App. 33) and he further testified that he would have been foolish to mention the accident or any physical disability in such correspondence because he wanted a job (Joint App. 36). It is apparent therefore that when he corresponded for positions, after the accident, he could have, and was willing, to work then. As aforementioned, appellee testified that despite the accident and resulting hospitalization he continued his correspondence in seeking a position during the last week he was in the hospital (Joint App. 21) and during the one and one-halves months after leaving the hospital, when he was having difficulty in getting around (Joint App. 42). His own orthopedist, Dr. Rush, testified that appellee could have resumed his work of lecturing during November or December, 1954 (Joint App. 51), and appellee confirmed this. (Joint App. 34). This was five to six months after the accident.

Dr. Bentley, Dean Emeritus of American University, one of appellee's witnesses, testified that: one of the duties of his office, when appellee was teaching at American University, was to interview applicants for positions (Joint App. 77); he knew that appellee, while he was at American University, was seeking a position elsewhere (Joint App. 77).

In further testimony, Dr. Rush, appellee's Doctor, could not give any percentage of disability on the part of appellee as a result of the accident (Joint App. 49-50) and stated that appellee suffered

mild shock from the accident from which he recovered during the day of the accident (Joint App. 51).

Accordingly, it is respectfully submitted that the evidence in appellee's case, hereinbefore referred to, established that: appellee received only a bachelor's degree at Yale University; thereafter he was principally employed as an advertising man with the exception of one position as account executive and another position as publicity and Public Relations man; his experience and employment as a teacher consisted of three appointments only, namely as teacher of Mathematics and English at Portland Academy for a period of three years, his teaching position at Kent University on the subjects of Advertising, Marketing and Marketing Research and his teaching position at American University for one school year; during March of 1954; because of his dissatisfaction with his position at American University, he started to correspond with at least seventy two colleges, universities and organizations in the United States and in foreign countries, seeking a position; he started such correspondence before the date of the accident which was June 8, 1954 and continued it after the accident; and that he intended to leave American University, as early as March, 1954, or at least during 1954, as evidenced by his testimony and that of Dr. Bentley of American University. In addition, there was no evidence upon which the jury should have held that he was entitled to damages for loss of employment in the summer school of American University during the summer of 1954 because his testimony and that of Dr. Bentley did not disclose that there was any commitment for his teaching summer school at American University nor was there any evidence of any kind as to the amount he would have earned from such summer school employment if he had gotten a commitment thereon. Indeed the record does not contain any evidence of there having been any classes in his subjects at American University during the summer of 1954. In view of all of

the correspondence of appellee to some 72 colleges, universities and organizations, and personal calls upon some of them, and appellant's Exhibit No. 3 wherein was contained a letter from Texas University at Austin stating that the position appellee presumed he might get was filled by a local individual of that University's choice, it is earnestly submitted that appellee just could not and did not get a position until the early part of 1956, because of his having only a Bachelor's Degree, and because of his advanced age of 62 years. Accident or no accident, appellee could not, and did not get a position because the colleges, universities, and organizations contacted did not look upon his applications favorably.

It is respectfully submitted, that the accident and the resulting injuries did not prevent appellee from getting a position, especially in view of the fact that he did not mention the accident and injuries in any of his correspondence seeking a position.

The jury, therefore, had no basis in the evidence for awarding appellee loss of employment concerning summer school at American University or any other losses of employment, because of his inability to obtain a position after the accident. In awarding appellee damages of \$1,000 for loss of summer employment in 1954, \$4500 because of appellee not getting a teaching job for the school year 1954-1955 and subsequent losses of \$2,000.00 per year (the difference between his earnings in Florida in 1956 at the rate of \$2500 per annum and a claimed teaching salary of \$4500 per annum, which claimed teaching salary included \$1,000 for summer school teaching, none of which was ever substantiated) for six years, and on into the future of until appellee is 70 years of age (Joint App. 81-82), the jury engaged in passion, sympathy and prejudice beyond question in awarding these damages, especially in view of the fact that there was no foundation in the evidence

for such damages. This attitude on the part of the jury resulted in its verdict being grossly excessive, unconscionable, and completely contrary to the evidence, to such extent that the verdict should have shocked the conscience of the Trial Court beyond the use of a remittitur and to such an extent that a complete new trial should have been awarded.

With reference to excessiveness of verdicts and awarding of new trials, attention of the Court is invited to the following authorities:

In Virginia Ry. Co. v. Armentrout (4 Cir. 1948), 166 F. 2d 400 involving a case where there were three trials, the jury failed to agree on a verdict in the first trial, a verdict in the sum of \$100,000.00 was returned in the second trial, which was set aside, and a new trial was awarded, and in the third trial the jury awarded a verdict of \$160,000.00, for personal injuries to a minor caused by a train of Virginia Ry. Co., Judge Parker stated the following in granting still another new trial:

At page 407:

"(10-12) And quite apart from the error in the charge, we think the trial judge erred in refusing to set aside the verdict as excessive and grant a new trial. Ordinarily, of course, the amount of damages is for the jury, and whether a verdict should be set aside as excessive is a matter resting in the discretion of the trial judge. This, however, is not an arbitrary but a sound discretion, to be exercised in the light of the record in the case and within the limits prescribed by reason and experience; and where a verdict is so excessive that it cannot be justified by anything in the record or of which the court can take judicial notice, it is the duty of the judge to set it aside. Failure to do so is an abuse of discretion, analogous to error of law, and as such reviewable on appeal."

At page 408:

"(16) The power and duty of the trial judge to set aside the verdict under such circumstances is well established, the exercise of the power being regarded as not in derogation of the right of trial by jury but one of the historic safeguards of that right. Smith v. Times Pub. Co., 178 Pa. 481, 36 A. 296, 35 L.R.A. 819; Bright v. Eynon, 1 Burr. 390; Mellin v. Taylor, 3 B.N.C. 109, 132 Eng. Reports 351.

The matter was well put by Mr. Justice Mitchell, speaking for the Supreme Court of Pennsylvania in *Smith v. Times Pub. Co.*, supra, 178 Pa. 481, 36 A. 298, as follows:

'The authority of the common pleas in the control and revision of excessive verdicts through the means of new trials was firmly settled in England before the foundation of this colony, and has always existed here without challenge under any of our constitutions. It is a power to examine the whole case on the law and the evidence, with a view to securing a result, not merely legal, but also not manifestly against justice, -- a power exercised in pursuance of a sound judicial discretion, without which the jury system would be a capricious and intolerable tyranny, which no people could long endure. This court has had occasion more than once recently to say that it was a power the courts ought to exercise unflinchingly.' *Italics Supplied by Court.*

"To the federal trial judge, the law gives ample power to see that justice is done in causes pending before him; and the responsibility attendant upon such power is his in full measure. While according due respect to the findings of the jury, he should not hesitate to set aside their verdict and grant a new trial in any case where the ends of justice so require. *Aetna Casualty & Surety Co. v. Yeatts*, 4 Cir., 122 F. 2d 350.

"(17) The power of this court to reverse the trial court for failure to exercise the power, where such failure, as here, amounts to an abuse of discretion, is likewise clear. It is true that under section 22 of the Judiciary Act of 1789, 28 U.S.C.A. Sec. 879, there may be no reversal on writ of error for any error in fact; and this rule has been frequently applied where reversal is sought because damages are excessive or inadequate. *Fairmont Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474, 53 S.Ct. 252, 77 L. Ed. 439. We do not understand the rule to have application, however, in those exceptional circumstances where the verdict is so manifestly without support in the evidence that failure to set it aside amounts to an abuse of discretion. In a situation of that sort, reversal is no more based on 'error in fact'

than reversal for refusal to direct a verdict for insufficiency of evidence. Whether there has been an abuse of discretion is a question of law in the one case, just as in the legal sufficiency of the evidence in the other. An appellate court is not required to place the seal of its approval upon a judgment vitiated by an abuse of discretion.

"That refusal to set aside a verdict which is grossly excessive constitutes an abuse of discretion reviewable on appeal is held directly in *Cobb v. Lepisto*, 9 Cir., 6 F. 2d 128, 129; *W. T. Rawleigh Co. v. Shoultz*, 3 Cir., 56 F. 2d 148; *Department of Water & Power v. Anderson*, 9 Cir., 95 F. 2d 577, 586; *Pettingill v. Fuller*, 2 Cir., 107 F. 2d 933, 936. In the case last cited Judge Augustus Hand, speaking for a court composed of himself, Judge Learned Hand and Judge Clark, stated the rule applicable as follows:

'In spite of the fact that the courts of the United States have been most loath to review orders granting or denying motions to set aside verdicts, it is implicit in the opinion of Justice Brandeis in *Fairmont Glass Works v. Cub Fork Co.*, 287 U.S. 474, 483-486, 53 S. Ct. 252, 77 L. Ed. 439, that they may do so in certain cases, one of which would seem to be an abuse of the trial judge's discretion. 287 U.S. at p. 485, 53 S. Ct. 252, 77 L. Ed. 439. There a review was declined because there was no explanation by the trial judge of his refusal to set the verdict aside and the record did not show that the verdict was clearly erroneous and arbitrary. ***That such an order may be reviewed on an appeal from a final judgment is undoubted unless the exercise of judicial discretion involved in making it is beyond the correcting hand of a court of appeal, no matter how arbitrary it was. We think that Justice Brandeis in *Fairmont Glass Works v. Cub Fork Co.*, 287 U.S. 474, 485, 53 S. Ct. 252, 77 L. Ed. 439, evidently regarded such orders as reviewable. Indeed, the dissenting Justices (Stone and Cardozo, JJ.) held that the court of appeals properly reviewed and reversed an order granting a new trial where the trial court had abused its discretion in refusing to set aside a verdict for nominal damages rendered by a jury in plain disregard of the evidence.'

"(18) That abuse of discretion in refusing to set aside a verdict is an exception to the rule that the granting or refusing of a new trial is not assignable as error, is definitely recognized in the following decisions: *Detroit Transfer Co. v. Pratt*, 6 Cir., 2 F. 2d 193; *Carter Coal Co. v. Nelson*, 4 Cir., 91 F. 2d 651, 654; *Western Union Tel. Co. v. Dismang*, 10 Cir., 106 F. 2d 362, 364; *Southern Fruit Distributors v. Fulmer*, 4 Cir., 107 F. 2d 456, 459. In the case of *Carter Coal Co. v. Nelson*, *supra* (91 F. 2d 654), this court, speaking through Judge Soper, said:

'The established rule in the federal appellate courts is that they have no power to review the action of a trial court in granting or denying a motion for a new trial for error of fact. Such a matter lies wholly within the discretion of the trial court and it is only when there is an abuse of such discretion that its action is reviewable.' *Italics supplied by Court.*

"The matter is fully discussed with annotations in 2 Am. Jur. 907, 911, where, after saying that 'the granting or refusing of a motion for a new trial, filed after a general verdict, is largely a matter of discretion, and that the action of the court in this respect is only reviewable for an abuse thereof', the rule is stated that 'the discretion of the court in granting a new trial in the above cases is not absolute, and the appellate courts have not hesitated, where an abuse of discretion has been shown, to reverse the action of the lower court'. And in one of the cases cited, reference is made to the rule of manifest wisdom that 'a court of review will more reluctantly interfere with the action of the trial court in granting a new trial than in refusing one'. *Strode v. Strode*, 194 Ky. 665, 240 S.W. 368, 370, 27 A.L.R. 313.

"For the reasons stated, the judgment appealed from will be reversed and the cause will be remanded for a new trial."

"Reversed and remanded."

In Day v. Union Pacific R. Co. (Mo. 1955) 276 S.W. 2d. 212, involving an action for personal injuries and property damages allegedly caused by defendant Railroad, the jury returned a verdict for the plaintiff

in the amount of \$25,000. Defendants motion for a new trial was granted on the ground that the verdict was so excessive as to indicate bias, passion and prejudice on the part of the jury. Upon appeal the action of the trial court in awarding the new trial was affirmed. In this case we have a somewhat similar factual situation on damages. Plaintiff's medical expenses were \$100 - \$150; evidence disclosed no broken bones and plaintiff was not rendered unconscious by the collision; medical examination showed bruises on the back, left hip, right side, and muscle spasm in the back. At the time of trial, plaintiff still had a spastic condition and a disc injury could have resulted from the condition which would result in temporary disability for about three months and thereafter 15% permanent disability. Plaintiff was 49 years of age at the time of trial and his average earnings were \$100 per week. In request for instructions, counsel for plaintiff did not ask for damages for either the property damages or future medical expenses as there was no evidence as to the latter. The court observed that the jury must have allowed at least \$24,850 of the \$25,000 verdict for other elements submitted by the plaintiff, namely pain and suffering, pain and suffering in the future, reasonable compensation for injuries and disabilities, and loss of earnings he had sustained and would sustain in the future. The court further observed that there was substantial evidence from which the trial court could have reasonably found that plaintiff's spinal condition at the time of trial was neither the result of injury sustained in the collision, nor as serious as he claimed and that noting the complete absence of any evidence upon which to base their award for loss of earnings, it held that the trial court did not abuse its discretion, after weighing all the evidence, and found that the \$25,000 verdict was so excessive as to indicate bias and prejudice on the part of the jury. The appellate court further held that a trial court may infer the jury's bias and prejudice solely from the size of the verdict and that a remittitur may not be ordered where the verdict resulted from the jury's bias and prejudice.

Cf. Keeter v. Devoe & Reynolds, (1936) 338 Mo. 978; 93 S.W. 2d 677; Ona v. Reachi (Cal. 1951) 233 P. 2d. 949.

In addition, in Keeter v. Devoe and Reynolds (Mo. 1936) 338 Mo. 978, 93 S.W. 2d. 677, referred to in the Day case supra, the trial court was held not to have abused its discretion in granting a new trial on the ground that a verdict of \$25,000 was excessive for injuries which included; fractures of the tibia and fibula; permanent leg weakening necessitating use of crutches for one year; dislocation of an ankle; fracture of the arm bone; and considerable pain and suffering.

b. Medical Expenses, Damage to Suit and Glasses

Appellee introduced in evidence the following damages as to medical expenses; The Georgetown University Hospital bill in the amount of \$420.70 (Appellee's Exhibit No. 5); the bill of his orthopedic physician, Dr. Rush, in the amount of \$325.00 (Joint App. 47); damage to his suit which he claimed cost him about \$80.00 (Joint App. 28); damage to his eyeglasses which he claimed cost him \$35.00 (Joint App. 28). It is further respectfully submitted that these are the only expenses that could be attributable to the accident. Furthermore, and although the hospital and Doctor's bill in the District of Columbia, only, could be definitely attributable to the accident, appellee was not entitled to full purchase price of the suit and glasses as the suit had been used and there was no testimony that the glasses were broken. As to taxi fares appellee claimed he had to expend during the month and a half after he was released from the hospital, counsel for appellee argued to the jury and placed on a blackboard \$140 for this item (Joint App. 81), which at best could have been based on appellee's testimony that he expended about \$3.00 a day for cabs for a month and half. (Joint App. 20). However, appellee's witness Mrs. MacDonald testified that during that period she and her husband carried appellee around numerous times in their automobile (Joint App. 76). The jury should have considered this service of the

the MacDonalds in mitigation of claimed cab expenses. However, the jury in further expression of sympathy and emotions for appellee allowed him all of these items to a full value of \$1000 (Joint App. 81). Although the amounts involved are relatively small, it is further respectfully submitted that full value should not have been allowed for the suit of clothes, eyeglasses and taxi fares.

c. Claimed Expenses Resulting From Duodenal Ulcer.

According to the testimony of Dr. Sullivan, local internist, he first saw and examined appellee just before the trial (Joint App. 54); historically the injury to the leg did not cause the ulcer (Joint App. 60-61, 68); when he examined him he could not tell whether the ulcer was bleeding (Joint App. 62); and at the time of his examination appellee's blood count was just below normal (Joint App. 62). Upon questioning of Dr. Sullivan by the trial court he stated that he took his history of the case from appellee (Joint App. 54, 61); he did not know what caused the ulcer but he inferred from the history given to him by appellee that it was caused by financial worry (Joint App. 69); if appellee's financial worries were removed or he had any type of security, it would be a big boon towards helping him get better or improve (Joint App. 69); in taking appellee's history, appellee did not tell him that he was gainfully employed from the first of the year (1956) until he went into the hospital in Florida, and he, Dr. Sullivan, did not ask appellee about that (Joint App. 70). Dr. Sullivan further testified that if appellee felt secure in his employment in Florida it would probably mean that there might have been other factors at work in the production of the ulcer in connection with stress and strain not only financial difficulties (Joint App. 70). In view of this testimony, which it is respectfully submitted established that the accident did not cause or have any causal relation to the duodenal ulcer, and because most certainly the accident did not cause any loss of employment, the jury should not have allowed

appellee any amount such as \$600 for hospital expenses in Florida in connection with the duodenal ulcer (Joint App. 26), or even \$578 as presented to the jury by counsel for appellee (Joint App. 82), or \$177 for the bill to his physician in Florida (Joint App. 26-27), or \$50 to Dr. Sullivan (Joint App. 65). The Trial Court permitted these items of damages to be placed on the blackboard in counsel for appellee's summation to the jury after counsel for appellants had secured from the Trial Court an instruction to counsel for appellee that he should not place any figures on the blackboard which were imaginary or without foundation in the evidence (Joint App. 79, 80). Most certainly, the expenses claimed to be attributable to the duodenal ulcer, according to the testimony of appellee's internist, had no causal or other relation to the injury to the leg resulting from the accident, in any way.

d. Entire Medical Aspect

Upon questioning by the Trial Court, appellee's orthopedic physician, Dr. Rush, testified that during his initial examination of appellee, immediately following the accident, he found the following conditions: no fractures of either leg; no damage to the bone structure; no damage to the supporting ligaments of the joints above or below the involved area nor were they torn or crushed but that there was damage to all the soft tissues.

Dr. Rush's opinion upon his last examination of appellee just before trial was that there was lack of circulation in the area of the wound (ulcer of the leg), based upon his conclusion that the wound had not healed as rapidly as he expected. (Joint App. 52-53).

As aforementioned, appellees internist testified that historically there was no relation between the accident and the duodenal ulcer.

As to kyphosis (rounding of the back), appellee's physician Dr. Rush, testified that he noticed that condition in appellee at the

time of the first examination and appellee's back, was very much the same at times of trial (Joint App. 49), and, Dr. Gordon, orthopedic physician who testified for appellants stated there was no increase in kyphosis as a result of the accident because this condition is found frequently in older people (Joint App. 74).

Dr. Gordon, in further testifying for appellants, stated that upon his first examination of appellee during May, 1955, it was noted that he walked with a halting type of gait, with a very stooped posture, which he, appellee, stated had been present for many years, that is, he was bent over in a sort of hunched position as he had a marked kyphosis deformity; x-rays of his left leg and ankle were entirely negative as they had been on admission to the hospital; there was a thickening of the right ankle probably due to an old fracture not related to the present injury; examination of his leg showed a small ulcer on his left leg which was 1 1/2" x. 1 1/2" in size; he had numerous superficial varicose veins of both feet and legs; and there was impeded circulation which had been present for many years, probably due to the varicose veins (Joint App. 71). Dr. Gordon further testified that during this initial examination he came to the following diagnosis: contusions of both lower extremities with an ulcer, chronic, moderate, of the left leg; secondary trauma, superimposed upon circulatory insufficiency (Joint App. 72). Dr. Gordon further testified that there were other diagnosis during this initial examination, which were many, consisting of benign prostatic hypertrophy (enlarged prostate, quite common in older people) chronic bronchiectasis of the chest; hypertension or high blood pressure due to arteriosclerosis or hardening of the arteries, and severe hypertrophic arthritis with subluxation, that is partial dislocation of the cervical spine which was old (Joint App. 72). Dr. Gordon further testified that he felt that the injuries which appellee sustained directly from the accident of 1954 were those of his legs, and

the right leg at that time had healed and he was having difficulty only with the left leg at that time; the chronic ulcer of the left leg had persisted because of poor circulation; appellee would have a partial disability of the left leg as a result of the chronic ulcer but inasmuch as appellee was a professor or teacher, not a laborer, it would be insufficient to interfere with his type of occupation; and it was obvious that a great deal of appellee's difficulty stemmed from pre-existing deformities of the upper back and neck with rather advanced degenerative changes due to his age (Joint App. 72-73).

Dr. Gordon further testified with reference to his second examination of appellee during November, 1956, just before the trial, that at that time appellee was obviously improved; an examination of his left leg showed no drainage from the previous ulcer area as it was covered with scaly type of skin and there was no drainage underneath it nor was there any open area, and appellee stated that it had been healed for a short time; appellee thought he was getting more round shouldered and stooping over more but he, Dr. Gordon, couldn't disclose that by his examination, and further that as people get older this condition is frequently found (Joint App. 73-74).

From the above it was clearly apparent that appellee at the time of the accident in June 1954 had many conditions which were degenerative, that is merely because of his age and previous physical condition; the injuries sustained as a result of the accident consisted only of contusions of both legs with a rather insignificant ulceration on his left leg and there were no broken bones or torn ligaments. Furthermore, it was obvious from the testimony of the orthopedic physicians on both sides of the case that the injuries sustained by the appellee at the time of the accident would not have prevented him from again engaging in his employment as an instructor, as early as November or December 1954 (Joint App. 51, 73).

e. Use of Remittitur

After hearing on appellants motion to vacate and set aside the verdict and judgment for appellee and for directed verdict under Rule 50 of the Federal Rules of Civil Procedure and/or for a new trial, the Trial Court issued its order denying the motion under Rule 50 and further provided,

"and it is further ordered that if, within ten days from this date, plaintiff shall file a remittitur of that part of the verdict and judgment in excess of \$17,500 the motion for a new trial will be denied as of the date of the filing of said remittitur; otherwise, said motion will be granted" (Joint App. 9, 10).

Attention of the court is invited to Minneapolis, Saint Paul and S.S.M. Ry. Company v. Moquin, 283 U.S. 520, 51 S. Ct. 501, 75 L. Ed. 1243, decided May 18, 1931, a recognized basis authority condemning the use of a remittitur in denying a motion for a new trial, wherein was involved an excessive verdict because of the exercise of passion and prejudice on the part of the plaintiffs counsel. Mr. Justice Roberts in delivering the opinion of the Court stated, with reference to the use of a remittitur:

"It is unnecessary to cite from the record what occurred at the trial, or to discuss the propriety of the views of the court below as to the basis of the verdict. The finding is quoted above, and our sole concern is as to the action it requires. Nor need we inquire into the rules applicable in trials under state law. Whether under the state's jurisprudence the present record would entitle petitioner to a new trial or to such a conditional order as was awarded is immaterial.

In actions under the federal statute no verdict can be permitted to stand which is found to be in any degree the result of appeals to passion and prejudice. Obviously such means may be quite as effective to beget a wholly wrong verdict as to produce an excessive one. A litigant gaining a verdict thereby will not be

permitted the benefit of calculation, which can be little better than speculation, as to the extent of the wrong inflicted upon his opponent.

The judgment is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed. "

And to the following authorities, citing and following the Minneapolis case supra:

National Surety Company v. Jean (6 Cir. 1932) 61 F. 2d 197, involving a verdict in an amount of \$25,000, in which the trial court denied a motion for a new trial upon the plaintiff filing a remittitur in the amount of \$5,000 the court held:

At page 198:

"This was a definite, though indirect, holding that the verdict was excessive, and, although the memorandum contains no specific statement to that effect, we infer that the court ascribed the error to passion, prejudice, or caprice as these were the only causes urged as a basis for its action or mentioned in the memorandum. Indeed, an examination of the record discloses no other reasonable explanation for the holding. The suggested remittitur was accepted, judgment for \$20,000 was entered, and the motion for a new trial was overruled. Appellant excepted and assigned error.

"(1, 2) The granting or denial of the motion was in the sound discretion of the trial court, and is not reviewable except for a clear abuse of discretion [Hines v. Smith, 270 F. 132, 141 (C.C.A. 6); Parker v. Elgin, 5 F. (2d) 562, 564 (C.C.A. 6); Kos v. Baltimore & Ohio R. R. Co., 28 F. (2d) 872 (C.C.A. 6); Detroit United Ry. v. Craven, 13 F. (2d) 352, 354 (C.C.A. 6)], but we do not find it necessary to determine whether there was such abuse in the present case since the trial court itself evidently found that the excessive verdict was the result of passion, prejudice, or caprice. Our question is whether after such finding the trial court may correct the mistake by the suggestion and acceptance of a remittitur, and the answer is that it could not. See

Minneapolis, St. Paul & Sault Ste. Marie Ry. Co. v. Moquin, 283 U.S. 520, 51 S. Ct. 501, 75 L. Ed. 1243; Schendel v. Bradford, 106 Ohio St. 387, 394, 395, 140 N.E. 155. The remedy is a new trial.

"The judgment is therefore reversed."

In Brabham v. State of Mississippi (5 Cir. 1938) 96 F. 2d 210, involving the denial of a motion for new trial upon plaintiff filing a remittitur in the amount of \$5,000 to a verdict of \$15,000, the appellate court reversed and remanded with directions, holding:

At page 213;

"(9, 10) * * * Verdicts made excessive by the passion and prejudice springing from indulgence, in the jury room, in such feelings, may not be cured by a remittitur, but only by a new trial. National Surety Co. v. Jean, 6 Cir. 61 F. 2d 197, Minneapolis, St. P. & S.S.M.R. Co. v. Moquin, 283 U.S. 520, 51 S. Ct. 501, 75 L. Ed. 1243; Fairmount Glass Works v. Coal Co., 287 U.S. 474, 485, 53 S. Ct. 252, 77 L. Ed. 439; c/f F. W. Woolworth Co. v. Wilson, 5 Cir., 74 F. 2d 439, 98 A.L.R. 681; On the general question of power over verdict, c/f Dimick v. Shiedt, 293 U.S. 474, 55 S. Ct. 296, 79 L. Ed. 603, 95 A.L.R. 1150."

In Southern Pac. Co. v. Guthrie (9 Cir. 1949-50) 180 F. 2d 295, although it was held that there was no abuse of discretion in refusing to grant a new trial, the following was held to be generally agreed upon where the verdict is the result of passion or prejudice:

At page 304:

"(9) It appears to be generally agreed that when it can be said that the verdict of the jury was the result of passion or prejudice, it is the duty of the appellate court to set aside the verdict and grant a new trial. Southern Pac. Co. v. Zehnle, 9 Cir., 163 F. 2d 453; L. E. Whitham Const. Co. v. Remer, 10 Cir., 105 F. 2d 371; American Ice Co. v. Moorehead, 62 App. D.C. 266, 66 F. 2d 792. In such a case a new trial must be ordered, -- the error cannot be cured by a remittitur. Minneapolis, St. P. & S.S.M. Ry. Co. v. Moquin, 283 U.S. 520, 51 S.Ct. 501, 75 L.Ed. 1243."

And in Fornwalt v. Reading Co. (U. S. D. C. Pa. 1948) 79 F. Supp. 921, the court stated the following with reference to the use of a remittitur in denying a motion for a new trial:

At page 924;

"(11, 12) Attention is called to the language in Smith v. Pittsburgh, etc., supra, 90 F. at page 787, and to that of Mr. Justice Harlan in Arkansas Valley, etc. v. Mann, supra, 130 U.S. at pages 74, 75, 76, 9 S. Ct. at pages 459, 460 as well as to 15 Am. Jur., Id., Section 204, p. 620, and section 205, p. 623, and see 3 Moore's Federal Practice, Section 59.02, p. 3243, as to the distinction between remitting in a case where excess is the only infirmity of the verdict and granting a new trial where the jury was either governed by passion or had deliberately disregarded the instructions of the court or the facts that made for the defendant. In either of the latter cases, the court should grant a new trial. In fact, in Minneapolis, St. Paul & Sault Ste. Marie Ry. Co. v. Moquin, 1931, 283 U.S. 520, 521, 51 S. Ct. 501, 75 L. Ed. 1243, Mr. Justice Roberts for the court held that in actions of this kind if the verdict is in any degree the result of passion or prejudice there can be no remittitur; a new trial must be awarded."

Such authority is definitely applicable to this appeal because the record in this case conclusively discloses a verdict which was the result of passion and sympathy which proved to be grossly prejudicial to the appellants, one of which is a corporation. Thus, the trial court should not have resorted to the use of a remittitur but should have, as indicated in the above cases, ordered a complete new trial.

It is further submitted that a remittitur should not be used where there is no evidence as to amounts upon which it can be based. Without doubt or contradiction, in using a remittitur, a trial court, of necessity, assumes the power of the jury to judge the facts as to damage. In thus invading the province of the jury a single individual, one trial judge,

judges the evidence as to damages in lieu of it being judged by a jury. In a case such as this where there was no evidence to support loss of earnings from summer school or loss of earnings from other employment neither jury nor judge should have formulated an opinion as to damages in the amount of \$25,000 or even \$17,500. If the jury gave the appellee benefit of all damages immediately resulting from the accident, and they were the only damages actually attributable to the accident, the total amount of such damages was \$860.70 and obviously this would not be a basis for a verdict as high as \$25,000 or even \$17,500. It is earnestly submitted that such amount of damage, to which could be added some damages for pain and suffering, should support a verdict not exceeding \$5,000 and that actually, the verdict should not have been as high as \$3500. Accordingly appellants are at a complete loss to understand how the trial court arrived at a figure of \$17,500, as suggested in the remittitur, because neither loss of employment nor the duodenal ulcer could have been attributed to the accident, according to the evidence.

II.

After The Trial Court Instructed Counsel For Appellee Concerning Use of The Blackboard in His Summation, The Trial Court should Not Have, Over Objection of Counsel For Appellants, Permitted Counsel For Appellee To Use of the Blackboard Beyond The Instructions On Such Use; and The Trial Court Abused Its Discretion And Committed Error, in Denying Appellants Motion For A New Trial On This Ground.

Due to the importance of this phase of this appeal, the following excerpts from the transcript of the proceedings are quoted:

"Mr. Richardson: Well now, I want to request that counsel for plaintiff be not permitted to use the blackboard, with reference to any figures he has pertaining to damages.

The Court: Oh, I won't stop him if he wants to use it to add up. But of course, as soon as he gets through, you can erase it, and that will be the end of it.

Mr. Richardson: Then, I further request that he be permitted to use the blackboard for figures only to the extent of the figures in evidence.

The Court: Oh, certainly.

Mr. Richardson: And nothing beyond that.

The Court: He can't draw on his imagination.

Mr. Richardson: Thank you.

The Court: All right.

Mr. Walsh: Thank you. I may not draw on my imagination on the blackboard, he means. I may draw on it otherwise? (Laughing)

Thank you, Your Honor.

Mr. Richardson: Thank you.

The Court: You can't draw on your imagination either way." (Joint App. 79, 80)

From the foregoing it is obvious that the trial court, in permitting counsel for appellee to use the blackboard in his summation to the jury, instructed such counsel that he could use the blackboard for figures only to the extent of the figures in evidence, and nothing beyond that, and that he could not draw on his imagination in using the blackboard, or otherwise.

Regardless of this instruction, in his summation to the jury counsel for the appellee used the blackboard beyond authority given to him by the trial court to such extent that he did display on the blackboard items and figures of damages not in evidence, and resorted to his imagination concerning other items and figures not in evidence. The occurrences incident thereto because of their importance in this appeal are quoted from the transcript of the proceedings:

Mr. Walsh: Now, it has been proved -- and this has all been testified. (At blackboard) Georgetown Hospital, 420. (Writing on board) Orthopedic surgeon, Dr. Rush, 325. Taxis after he got off his crutches to be transported, 140. \$80 for the suit that was ruined when the truck went over him. \$35 for the reading glasses which were thrown and scratched and unusable. \$1,000, very clear.

The summer job, the work he couldn't do when he was on his back or on crutches, \$1,000. \$2,000. All testified to.

Mr. Richardson: If Your Honor please, I object to this item, in view of the fact that there is no testimony whatsoever as to how much Professor Christie would have made, had he gotten this summer school job.

The Court: I think he said it would be a thousand dollars.

Mr. Richardson: He did? Then I beg your pardon.

The Court: That is my recollection; but the jury will recall.

Mr. Richardson: That wasn't my recollection.

Mr. Walsh: Now. He did not get the teaching job for the ensuing academic year of 1954-5. \$4500. (Continuing to write on board)

The Court: I thought he said he made \$3400.

Mr. Richardson (Simultaneous with Court): I don't recall that, if your Honor please.

Mr. Walsh: \$3400, if Your Honor please, plus summer school which he testified is the usual thing, that if you get the nine months' job, you get the summer school.

The Court: Very well.

Mr. Richardson: Well, what university was this?

The Court: You may argue that point?

Mr. Walsh: Not on my time, please, Mr. Richardson.

The Court: You may argue.

Mr. Walsh: Now we have got \$6500.

Now, he found himself down in the Winter Park Hospital with a bleeding ulcer. 578. The doctor down there, 177. (Writing on board as before). The ulcer doctor here. (Writing 50 on board) \$805. (Writing \$7305 on board)

All right, now. As a result of all this, ascertaining it has been shown that from that time, his earning capacity has certainly been impaired. He has been making, as he has testified, approximately \$2500. Had he been able to work in his usual capacity, \$4500. So that for the last year, he has lost \$2000, the difference between \$2500 and \$4500.

Now, that is \$9300.

What about the future? There has been testimony by Dr. Sullivan and Dr. Rush that he won't be able to do the type of work for the future. (Underscoring supplied) Well, he is 65. A man of his education and his training should certainly be able to earn \$4500 a year until he is 70. That's five years, at a difference of \$2000. So we will take the 9300 and we will add five years at \$2000 a year: 29,300. (Sic)

Now, pain and suffering, -- I had to drop the crayon.

The Court: Your 40 minutes have now expired. If you want to save 10 minutes for rebuttal, this is the time to do it.

Mr. Walsh: Well, I suggested to Mrs. Burroughs that it was a minute I had. We put it at 12:29.

The Court: All right.

Mr. Walsh: Just one minute.

I just wanted to point out that pain and suffering, I am not putting pain and suffering down there. How much? 21 days in the hospital. How much a day for the days in the hospital, at Georgetown? How much on the crutches and on the cane? How much walking in the streets to the doctors? How much, all those months before going to Florida? How much for the ulcer? How much for the days in the hospital with the bleeding ulcer, when he had blood transfusions? That is pain and suffering. He is entitled to be compensated for it.

But who can say what the value is? That is, who can testify to the value? Who can give evidence?

Nobody. You have got to give a value to it. Because he is entitled to be compensated for all the items that have been enumerated here -- because, of course, you are free to give your own values to them. But all those items, all those elements, plus pain and suffering, from June 8th to today; and for the future, for the future, so long as injuries which caused pain and suffering, and which have been the result of this accident, persist.

Thank you, ladies and gentlemen.

Thank you, Your Honor.

Mr. Richardson: Mr. Walsh, take a minute of my time and correct this computation here, if you will. I don't think that is 29,000.

Mr. Walsh: Oh, I'm sorry. (Correcting figure on board from 29,300 to 19,300).

Mr. Richardson: Thank you. (Joint App. 81-83)

(a) Items established in evidence: as a result of the accident complained of:

It is respectfully submitted that the following items, were the only items established in evidence to have resulted from the accident complained of:

Bill of Georgetown Hospital	\$420.70
Bill of Dr. Rush for treatment of the legs	\$325.00
Cost of suit	\$ 80.00
Cost of glasses	\$ 35.00
Total	\$860.70

Surely, the \$140 for taxi fares should not have been displayed on the blackboard especially because of Mrs. MacDonald's testimony that she and her husband carried appellee around numerous times in their car during the one and one-half month period involved (Joint App. 76).

The full purchase price of \$80.00 for the suit and \$35.00 for the glasses should not have been displayed on the blackboard because both of these items had been used and accordingly appellee was not entitled to full purchase cost of them. Furthermore, appellee testified he was using the same glasses at time of trial (Joint App. 18).

(b) Items Displayed on the Blackboard Which Did not Result from the Accident

The \$1,000 displayed for the claimed loss of the summer job should not have been placed on the blackboard because the only testimony concerning this loss was that appellee had an opportunity to go to Portland, Maine on a personnel job which he claimed would have paid him about \$1000 for a duration, he thought, of two and one-half months, and the man who was going to help him get the job was a Mr. Thayer who had written him about it (Joint App. 23-24) but that he, appellee, had not saved the correspondence because it was personal, and he did not think his counsel would need it (Joint App. 40). Nevertheless, and over objection of counsel for appellants, counsel for appellee displayed the \$1000 figure on the blackboard as a loss attributable to the accident.

Counsel for appellee next exhibited on the blackboard \$4500 as a loss because appellee did not get a teaching job for the academic year 1954-5, observing to the court that the \$4500 item consisted of \$3400 plus summer school. Apparently counsel for appellee meant that \$3400, the normal compensation for the ensuing academic year of 1954-5 at American University, plus \$1,000 for summer school resulted in the total of \$4500 placed on the blackboard. In any event, the trial court permitted the \$4500 to be placed on the blackboard concerning this item after objection of counsel for appellants and in spite of the fact that this amount was purely imaginary, in that the evidence disclosed that although appellee had written to in excess of 72 colleges,

universities, and business organizations, and made personal calls upon some of them, he had not been able to get a position of any kind from the time of the accident until during January, 1956 at American University or at any other place. This error in permitting the \$4500 to be displayed on the blackboard was of monumental importance because thereafter counsel for appellee used that figure and by deducting earnings in the amount of \$2500 per year (the salary that appellee claimed he was getting from his 1956 employment in Florida), projected a claimed loss from earnings into the future and until appellee attains the age of 70 years. Thus, the wildest of imagination and speculation was engaged in by counsel for appellee in placing these figures on the blackboard for he thereby displayed a build up of damage from \$860 which was made up of the Georgetown Hospital bill expense, Dr. Rush's bill, and the full purchase price of the suit and glasses, to a total of \$19,300 which included the hospital bill and doctors bills pertaining to the duodenal ulcer claimed to have resulted from the accident, which is being hereinafter referred to, and the aforementioned claimed loss of employment.

With further reference to the duodenal ulcer and claimed expenses incident thereto, it is respectfully submitted that the testimony of appellee's internist did not establish that the duodenal ulcer resulted from the accident (Joint App. 53-70). To the contrary, Dr. Sullivan, appellee's internist, reported in his medical report and also testified that there was no causal relationship between the accident and the duodenal ulcer (Joint App. 60, 61, 68). Dr. Sullivan testified that had he known appellee had been gainfully employed prior to his examination of him that his thoughts would have been directed toward some other emotional strain other than financial worries, which may have caused the duodenal ulcer (Joint App. 70). Furthermore, although Dr. Sullivan tried to establish through his testimony the cost of hospitalization, hospital treatment and service at Winter Park, Florida, he admitted in

his testimony that he did not have any actual knowledge of such costs, as the costs he had testified to were for such items in a hospital in Miami, Florida (Joint App. 66-67). But, counsel for appellee was permitted by the trial court to display on the blackboard \$578 for hospital expenses at Winter Park, Florida, thus further engaging in imagination; \$177 which appellee testified was Dr. Ramsey's bill in Florida, and \$50.00 which Dr. Sullivan charged. Due to the testimony of Dr. Sullivan to there being no causal relationship between the accident and the duodenal ulcer, it is earnestly and respectfully submitted that these last mentioned items should not have been displayed on the blackboard because the evidence established that they were not connected in any way with the accident.

It will be noted from the transcript of the proceedings that counsel for appellee erroneously added his items displayed the blackboard to a total of \$29,300 but that he corrected this figure to \$19,300 (Joint App. 83). It is respectfully submitted that the unauthorized use of the blackboard resulted in the jury engaging in passion and prejudice to the extent of accepting the unjustifiable figure of \$19,300 exhibited on the blackboard and adding to it an attorney's fee of one-third to the total unjustifiable, unreasonable, and unconscionable sum of its verdict in the amount of \$25,000 of which only \$860.70 had been actually established in evidence, exclusive of pain and suffering, as a result of the accident complained of.

(c) Attention of the Court is further invited to Warren Petroleum Corporation v. Pyeatt, (Texas, 1955), 275 S.W. 2d 216, wherein judgment for the plaintiff was reversed and the case remanded for a new trial because of improper use of the blackboard in displaying charts, containing among other things, items of damages. The Court held:

"Defendants objected to the placing of said charts upon the blackboard and to their use in the closing argument for many reasons, the chief objection being that 'the use of the charts were highly prejudicial and effectively injected new and unsworn testimony for the jury consideration.' With this contention we agree. We do not believe the use of such charts would be permissible in any case over timely objection."

III.

The Trial Court Did Not Handle The Jury Properly In Informing The Jury That if a Verdict Was Not Agreed Upon By 6:30 p. m., Friday, November 30, The Jury Would Have To Report Back On The Case on Saturday, December 1, 1956.

Again due to the importance of this portion of the trial, the following extracts from the transcript of the proceedings quoted:

"(At 6:00 p. m., the jury returned to the courtroom and the following proceedings occurred:)

The Court: Who is the foreman?

The Jury Foreman: I am. (Rising to his feet)

The Court: Mr. Foreman, not having heard from you, I assume that the jury has not as yet agreed upon a verdict.

The Jury Foreman: We have agreed on the liability but not on the amount.

The Court: Well, it is now six o'clock, and I assume that -- or rather, I suppose that some of you have engagements for the evening. Be seated, sir. Under those circumstances, I am going to allow you to separate and then return tomorrow morning at ten o'clock and resume your deliberations -- that is, unless you think there is likelihood, Mr. Foreman, of reaching an agreement within a reasonably short time. Do you think there is such a likelihood? Don't state anything except yes or no.

The Jury Foreman: There is a possibility.

The Court: Well, do you think that another half hour might be desirable before I release you for the night?

The Jury Foreman: I think it is worth trying, yes.

The Court: Very well, I will let you deliberate a little further until, say, six-thirty, and then if you don't reach an agreement, I shall take appropriate steps in the matter.

I don't want anyone to give up his views at all because of the time limitation. This case is entitled to your full, fair and complete consideration, even though it has to go over until tomorrow.

(Whereupon, the jury retired once more, to resume its deliberations in the jury room.)

The Court: Well, I will see you at six-thirty.

Mr. Richardson: I beg your pardon?

The Court: I will see you at six thirty. If they don't reach agreement by then, I am going to send them home for the night and let them come back tomorrow morning.

Mr. Richardson: I think they will reach an agreement.

The Court: Well, we shall see what we shall see.

(Whereupon, the Court recessed once more, to await the verdict of the jury.) (Joint App. 86-87)

The jury in this trial retired for consideration of the case at 3:45 p. m. on Friday, November 30, 1956.

It is most earnestly submitted that the aforementioned action of the trial court was highly prejudicial to the defendants and a contributing cause for the jury rendering the \$25,000 verdict. When this jury was given one half an hour to further deliberate, with the instruction of the court that it would have to report back on the case at 10 a. m. the next morning, a Saturday morning, prevalently a non-working weekend day,

there is no doubt that the members of the jury became more careless, more frustrated and further disregarded the evidence and the instructions of the trial court on damages. It is common knowledge that a large percentage of individuals either leave town on Friday afternoon or evening for a weekend of endeavor or, to say the least, have definite plans and commitments for Saturdays. In addition the next day, Saturday, December 1, was the beginning of the month during which Christmas occurs thus occasioning activities on the part of individuals leading towards the Christmas and New Years holidays. It is further earnestly submitted that the jury, in view of all of these facts, most hurriedly considered the damage phase of this trial, to the end result of rendering a verdict which was improperly considered and, which not only went far beyond the evidence and involved imagination but also involved passion, emotion, and prejudice against the appellants.

It is further submitted that for a jury to finally decide on damages in thirty minutes, at the end of a four day trial, speaks of and emphasizes the improper action on the part of the court in the handling of the jury, and improper and unjustifiable action on the part of the jury in arriving at such an unconscionable verdict of \$25,000.

CONCLUSION

Appellee was employed as a teacher less than one-half of the years of his employment until the time for trial. As early as March, 1954 (accident occurred on June 8, 1954) he had informed American University that he was not going to teach there in September, 1954, and that he was seeking employment elsewhere. Appellee neither had a commitment for employment in the summer school at American University nor did he know what compensation he would have received from such summer school employment. As to the summer employment in Maine the evidence did not disclose any commitment with reference thereto nor any agreement as to what the compensation would have been for such employment.

The accident did not prevent appellee from getting any employment because the evidence disclosed that through an advertisement, and correspondence with over 72 colleges, universities and organizations, and personal contact with many of them, beginning in March, 1954 and continuing until after the accident, appellee was not able to get employment until January, 1956. Appellee's claim that he was going to get a position at Texas University at Austin was not substantiated by the evidence, because of appellant's Exhibit #3, hereinbefore set forth. The orthopedic physicians who testified established that even though appellee sustained injuries from the accident he could have resumed his work as a teacher as early as November or December, 1954, this being approximately six months after the accident. The only shock resulting to appellee from the accident was of a duration of one day, which was the day of the accident. Accident or no accident, appellee just could not get a position through his various efforts, because the colleges, universities and organizations he corresponded with and contacted did not consider favorably the applications of this 62 year old appellee.

Therefore, the jury should not have awarded appellee \$1,000 as loss of summer employment in 1954, \$4,500 because of lack of employment during the school year 1954-1955, and subsequent losses of \$2,000 per year for six years, or on into the future until appellee is 70 years of age, as such items were not only not established in the evidence but such action on the part of the jury exhibited passion, emotions, and prejudice, and involved the wildest of imagination and speculation.

Medically, the evidence disclosed that as a result of the accident appellee had no fractures, no damage to the bone structure, nor damage to supporting ligaments, but merely damage to the soft tissues of his legs with a non-serious type of skin ulcer on one leg which did not

heal as quickly as his orthopedic physician had expected, because of lack of circulation. The evidence did establish by the testimony of appellant's orthopedic physician that appellee had many degenerative conditions which were not connected with or caused by the accident in any way and that the lack of circulation most probably resulted from his general degenerated physical condition.

After the trial court had instructed and authorized counsel for appellee on the use of the blackboard the trial court should not have permitted counsel for appellee to exceed his authority, in placing on the blackboard in full view of the jury items and amounts of damages which had not been established in evidence and which were without foundation in evidence, because such visual portrayal of these items resulted in the jury, in expression of passion, emotions and prejudice, fixing its verdict by the use of the total of \$19,300 displayed and an attorney's fee of one-third thereof, in the final amount of the verdict of \$25,000.

The trial court erred in handling the jury when it instructed the jury that if it did not return a verdict by 6:30 p. m. on a Friday evening it would have to report back on the case on the next morning, a Saturday morning, during the first part of December, the month during which the Christmas holiday occurs. This instruction to the jury caused the members thereof to become more careless and to more hurriedly arrive at a verdict in this four day trial, all to the prejudice of the appellants, one of which is a corporation.

A remittitur should not have been used by the trial court because the authorities referred to herein dictate that a remittitur should not be used when a verdict is a result of passion, emotions and prejudice.

The trial court must have recognized that there was an exercise of passion and prejudice on the part of the jury in rendering its verdict or otherwise it would not have used a remittitur.

It is most respectfully requested that the judgment appealed from be reversed and the case be remanded for a complete new trial.

Respectfully submitted,

CHARLES E. PLEDGER, JR.
RANDOLPH C. RICHARDSON

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Of Counsel

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JOINT APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

458

[Filed Aug. 18, 1954]

RICHARD B. CHRISTIE
3130 Wisconsin Avenue, N. W.
Washington, D. C.

Plaintiff

vs.

ROBERT E. HAYCOCK, JR. and
STANDARD FLOORS, INC., a corporation
1320 Q Street, N. W.
Washington, D. C.,

Defendants

Civil Action No. 3506-'54

COMPLAINT
(Personal Injuries)

1. Plaintiff is an adult, sui juris, and a resident of the District of Columbia. Defendant Robert E. Haycock, Jr., is an adult, sui juris, and a resident of the State of Maryland. Defendant Standard Floors, Inc. is a corporation doing business in the District of Columbia, at premises 1320 Q. Street, Northwest. The amount in controversy exceeds the sum of Three Thousand Dollars (\$3,000.00), exclusive of costs.

2. On or about June 8, 1954, at approximately 12:30 o'clock P. M., plaintiff, while walking north, in line with and on the west sidewalk approaching 4000 Wisconsin Avenue, Northwest, in the District of Columbia, was struck and run over by a motor vehicle owned by defendant Standard Floors, Inc. and then and there being negligently and carelessly operated by the defendant, said Standard Floors, Inc., acting by its agent and employee, the defendant Robert E. Haycock, Jr.

3. As a result of the foregoing negligent collision, plaintiff sustained

severe injuries to his legs, causing nervous shock, mental anguish, pain and suffering and permanent physical injuries. As a result of the afore-said injuries, plaintiff has been disabled and prevented from engaging in his normal occupation as college professor, or any gainful employment, and has therefore suffered complete loss of earnings and will continue

459 in the future to suffer loss of income. As a further result, he has been caused, and in the future will continue to be caused, to spend large sums of money for medical care and hospital treatment.

WHEREFORE, plaintiff demands judgment against defendant Haycock and defendant Standard Floors, Inc., in the sum of Thirty-five Thousand Dollars (\$35,000.00), besides the cost of this suit.

A jury trial of all issues is demanded.

/s/ Paul B. Cromelin

/s/ Richard L. Walsh

* * * *

(Attorneys for Plaintiff)

[Filed Oct. 12, 1954]

460

ANSWER OF DEFENDANT STANDARD
FLOORS, INC. TO COMPLAINT

First Defense

The complaint fails to state a claim against this defendant upon which relief can be granted.

Second Defense

This defendant admits the allegations of paragraph numbered 2; admits the occurrence of the accident at the time and place alleged; admits the ownership of the motor vehicle; admits that defendant Haycock was its employee; denies that said motor vehicle was then and there being negligently and carelessly operated; and avers that it is without knowledge or information sufficient to form a belief as to the truth of the allegations regarding plaintiff's injuries, losses, expenses and damages.

Third Defense

Plaintiff failed and neglected to exercise due care for his own safety

at the time and place alleged in the complaint and this defendant avers that such failure and neglect caused or contributed to cause the injuries, losses, expenses and damages complained of by plaintiff.

PLEDGER, EDGERTON & RICHARDSON

By /s/ Charles E. Pledger, Jr.

* * * *

Attorneys for defendant
Standard Floors, Inc.

461 (CERTIFICATE OF SERVICE)

[Filed Nov. 8, 1954]

462

ANSWER OF DEFENDANT ROBERT E. HAYCOCK, JR.
TO COMPLAINT

First Defense

The complaint fails to state a claim against this defendant upon which relief can be granted.

Second Defense

This defendant admits the allegations of paragraph numbered 1; admits the occurrence of the accident at the time and place alleged; admits that he was operating a motor vehicle owned by defendant Standard Floors, Inc.; denies that he operated said motor vehicle negligently and carelessly; and avers that he is without knowledge or information sufficient to form a belief as to the truth of the allegations regarding plaintiff's injuries, losses, expenses and damages.

Third Defense

Plaintiff failed and neglected to exercise due care for his own safety at the time and place alleged in the complaint and this defendant avers that such failure and neglect caused or contributed to cause the injuries, losses, expenses and damages complained of by plaintiff.

PLEDGER, EDGERTON & RICHARDSON

By /s/ Charles E. Pledger, Jr.

Attorneys for Defendant Robert E. Haycock, Jr.

(CERTIFICATE OF SERVICE)

[Filed May 31, 1956]

463

PRETRIAL PROCEEDINGS

STATEMENT OF NATURE OF CASE:

This is an action for damages for personal injuries alleged to have been sustained by P while walking north in line with and on the west sidewalk approaching 4000 Wisconsin Avenue, N.W. at which time P alleges he was struck by a motor vehicle owned by D Corporation and allegedly negligently operated by an agent or employee of said corporation as a result of which P alleges he sustained injuries.

Ds admit the occurrence of the accident; deny any negligence on their part and allege that any and all injuries which may have been sustained by P were the result of his sole or contributory negligence.

The pretrial statements of P and D respectively adequately outline the situation surrounding this action and are consequently adopted by the court and by reference made part of this pretrial statement and order of the court.

All stipulations, including those amended and initialled by counsel and by the court proposed by Ds in their pretrial statement are agreed to by the parties hereto and are likewise adopted by the court as the stipulations applicable in the trial of this action.

/s/ Chas. F. McLaughlin

PRETRIAL JUDGE

/s/ Richard L. Walsh

/s/ Charles E. Pledger, Jr.

[Filed May 31, 1956]

464

PRETRIAL STATEMENT OF PLAINTIFF

On or about June 8, 1954, at approximately 12:30 o'clock P.M., plaintiff, while walking north, in line with and on the west sidewalk approaching 4000 Wisconsin Avenue, Northwest, in the District of Columbia, was struck and run over by a motor vehicle owned by defendant Standard Floors, Inc. and then and there being negligently and carelessly operated by the defendant, said Standard Floors, Inc., acting by its agent and em-

ployee, the defendant Robert E. Haycock, Jr.

/s/ Richard L. Walsh

* * * *

Attorney for Plaintiff

(CERTIFICATE OF SERVICE)

[Filed May 31, 1956]

465

PRETRIAL STATEMENT OF DEFENDANTS

Defendants admit the occurrence of the accident at the time and place alleged; deny negligence and assert negligence on the part of plaintiff causing or contributing to cause the accident. Plaintiff's negligence consisted of failing to exercise due care for his own safety at the time and place alleged and under the circumstances and conditions then and there existing, including failing to keep a proper lookout.

STIPULATIONS:

1. Defendants' counsel shall be furnished with complete and itemized list of plaintiff's expenses and losses within 15 days of pretrial proceedings.

2. Defendants' counsel shall be furnished with complete and detailed list of plaintiff's injuries within 15 days of pretrial proceedings. This list shall specify which injuries are claimed to be permanent.

3. Plaintiff shall put up One Hundred Dollars (\$100.00) cash or a Two Hundred Dollar (\$200.00) bond with the Clerk of this Court as non-resident security for costs five (5) days in advance of trial.

4. Defendants have permission, if they so desire, to have plaintiff examined by a physician of their choice. Plaintiff to be in Washington 5 days in advance of trial for this purpose unless examination made in the meantime.

5. A list of witnesses expected to be called at the trial shall be exchanged between counsel for the respective parties within 15 days of pretrial proceedings.

PLEDGER, EDGERTON & RICHARDSON

By

/s/ Charles E. Pledger, Jr.

512 Washington Building
Washington 5, D. C.
Attorneys for Defendants

466 (CERTIFICATE OF SERVICE)

467

VERDICT AND JUDGMENT

[Filed Nov. 30, 1956]

This cause having come on for hearing on the 27th day of November 1956, before the Court and a jury of good and lawful persons of this district, to wit:

Bertha C. Jenkins

Dorothy A. Mc Leaf

Benjamin H. Craig

Miriam D. Sandler

Helen H. Poindexter

Grace E. Swartz

Francis G. Wadleigh

Rose V. Gardner

Edna N. Sater

Velma N. Baldwin

Mildred E. Coates

Sarah F. Speller

who, after having been duly sworn to well and truly try the issues between Richard B. Christie, plaintiff and Robert E. Haycock, Jr. and Standard Floors, Inc., defendants, and after this cause is heard and given to the jury in charge, they upon their oath say this 30th day of November, 1956, that they find the issues aforesaid in favor of the plaintiff and that the money payable to him by the defendants by reason of the premises is the sum of Twenty-five thousand (\$25,000.00) Dollars.

Wherefore, it is adjudged that said plaintiff recover of the said defendants the sum of Twenty-five thousand (\$25,000.00) Dollars together with costs.

By direction of

Judge David A. Pine

Harry M. Hull, Clerk,

By /s/ Irene B. Burroughs

Deputy Clerk

[Filed Dec. 7, 1956]

470 MOTION OF DEFENDANTS ROBERT E. HAYCOCK, JR.
AND STANDARD FLOORS, INC., A CORPORATION, TO
VACATE AND SET ASIDE VERDICT AND JUDGMENT FOR
PLAINTIFF AND FOR DIRECTED VERDICT UNDER RULE
50 OF THE FEDERAL RULES OF CIVIL PROCEDURE
AND/OR FOR A NEW TRIAL

Defendants Robert E. Haycock, Jr. and Standard Floors, Inc., a corporation, move the Court to vacate and set aside the verdict and judgment for the plaintiff entered herein on November 30, 1956, and

A. For entry of Judgment for the defendants notwithstanding the verdict upon their motions for directed verdicts, pursuant to the provisions of Rule 50 of the Federal Rules of Civil Procedure, and for reasons therefor state:

1. The opening statement of counsel for plaintiff did not mention negligence or violation of Traffic Regulations or set forth matters which would be established in plaintiff's case, entitling him to recover. Further, Counsel for plaintiff should not have been permitted, over objection of counsel of defendants, to amend his opening statement because through motion of counsel for defendants for a directed verdict on the opening statement of counsel for plaintiff, plaintiff's counsel was permitted to be guided and educated as to what he should supply in his amendment to his opening statement.

471 2. Even though counsel for plaintiff was permitted to amend his opening statement it remained defective, as outlined in aforementioned paragraph numbered 1, in that counsel for plaintiff did not identify sufficient evidence to be offered in plaintiff's case to entitle him to recover.

3. Defendants' motions for a directed verdict at the conclusion of plaintiff's case and at the conclusion of all of the evidence should have been granted under the case law of the District of Columbia and elsewhere in that the plaintiff's case, and all of the evidence of the case, established

contributory negligence as a matter of law on the part of the plaintiff.

and/or in the alternative:

B. For a new trial, and for reasons therefor states:

1. The verdict was grossly excessive, unconscionable, and one which should shock the conscience of this Court.
2. The verdict is contrary to the evidence and the weight of the evidence.
3. The verdict is contrary to law.
4. Counsel for the plaintiff should not have been permitted to use the blackboard in exhibiting to the jury items and amounts of damages claimed by plaintiff.
5. Counsel for the plaintiff should not have been permitted to use the blackboard in exhibiting to the jury items and amounts of damages which had not been introduced into evidence.
6. Counsel for the plaintiff should not have been permitted to use the blackboard in exhibiting to the jury items and amounts of damages which were strictly speculative and without foundation in the evidence of the case.
7. When the jury returned to the Court room at 6:00 p. m., on Friday, November 30, 1956, and the foreman announced that a verdict had not been arrived at, the jury should have been excused until 10:00 a. m., Monday, December 3, 1956, for further consideration of the case instead of being informed by the Court that it could have another one-half hour for deliberation and if no verdict was arrived at by that time the jury would be required to report at 10:00 a. m., Saturday, December 1, 1956. Aforementioned handling of the jury by the Court constituted error and was highly prejudicial to defendants.

472

And for such further grounds as may be brought to the attention of

this Court at the oral hearing of this motion, which hearing is hereby requested.

PLEDGER, EDGERTON & RICHARDSON

By /s/ Randolph C. Richardson

* * * *

/s/ Richard W. Galiher

* * * *

Attorneys for Defendants

TO: Richard L. Walsh
1366 National Press Building
Washington, D. C.

Attorney for Plaintiff

PLEASE TAKE NOTICE that the memorandum of points and authorities in support of this motion is attached hereto. The rules of the Court require that if you oppose the granting of the above motion, you shall file with the Clerk of this Court within five (5) days from the date of service of a copy of this motion upon you, or within such further time as the Court may grant, or, as the parties to this suit may agree upon, the statement of points and authorities upon which you rely, and serve a copy thereof upon counsel for defendants.

/s/ Randolph C. Richardson

/s/ Richard W. Galiher

473 (CERTIFICATE OF SERVICE)

[Filed Jan. 3, 1957]

474

ORDER

Upon consideration of defendants' motion "to vacate and set aside verdict and judgment for plaintiff and for directed verdict under Rule 50 of the Federal Rules of Civil Procedure and/or for a new trial," together with memoranda in support thereof and in opposition thereto, and oral argument of counsel thereon, it is, by the Court, this 3d day of January 1957,

ORDERED that the motion to vacate and set aside the verdict and judgment for plaintiff and to enter a judgment for defendant under Rule 50 be and the same hereby is denied;

AND IT IS FURTHER ORDERED that if, within ten days from this date, plaintiff shall file a remittitur of that part of the verdict and judgment in excess of \$17,500, the motion for a new trial will be denied as of the date of the filing of said remittitur; otherwise, said motion will be granted.

/s/ David A. Pine
Judge

(CERTIFICATE OF SERVICE)

475 [Filed Jan. 9, 1957]

PRAECIPE

UNITED STATES DISTRICT COURT
For the District of Columbia

the 9th day of January 1957

RICHARD B. CHRISTIE)

vs.)

ROBERT E. HAYCOCK, JR. et al)

Civil Action No. 3506-54

The Clerk of said Court will please enter a remittitur of that part of the verdict and judgment in the above cause in excess of \$17,500.

/s/ Richard L. Walsh

United Press Building

Attorney for Plaintiff

[Filed Feb. 8, 1957]

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NOTICE OF APPEAL

Notice is hereby given this 8th day of February, 1957 that defendants hereby appeal to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 30th day of November, 1956 and from the Order of this Court denying a Motion for a New Trial entered on the 9th day of January, 1957 in favor of plaintiff

against said defendants.

PLEDGER, EDGERTON & RICHARDSON

By /s/ Randolph C. Richardson

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/s/ Richard W. Galiher

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Attorneys for Defendants

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

[Filed March 4, 1957]

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Washington, D. C.

Tuesday, November 27, 1956

The above-entitled matter came on for trial before JUDGE DAVID
A. PINE and a jury at 11:50 a. m.

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OPENING STATEMENT ON BEHALF OF THE PLAINTIFF

MR. WALSH:

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We will have expert testimony to show the jury and the Court that
it is the usual practice in the academic world of higher education, uni-
versities and colleges, for the professors and teachers to find their own
jobs, and that when a professor is looking for a job, he must write hun-
dreds of letters and make hundreds of contacts and actively pursue it.
There is no system.

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RICHARD BENJAMIN CHRISTIE

was called as a witness and, having been first duly sworn, was examined
and testified as follows:

DIRECT EXAMINATION

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BY MR. WALSH:

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7

Q. What is your educational background? Are you a graduate of
college? A. Yes.

8

Q. What college? A. Yale University.

Q. And what year? A. 1914.

Q. 1914. Will you tell the Court and the jury what you did follow-
ing your graduation from Yale, without going into irrelevant details?
What was your first job? A. My first job was a teacher of mathematics
and English at Portland Academy, Portland, Oregon.

Q. How long was this? A. Three years.

Q. Where did you go from there? A. From there I was in service, in the -- Well, first I went back to New York after that and took a job in the Lindy Air Products Company.

Q. And then you went into service. What branch? A. Then I went into the Navy.

Q. How long did you serve there? A. Two years, about.

Q. When you were released from the service, what did you do?
A. Then I went into the advertising business.

Q. And how long did you remain in that business? A. I was in that about forty years -- or, no, not that long. Let's see. About twenty-
9 five years.

Q. Will you name some of the jobs you held in that field? A. I was in the research department of the Frank Seaman advertising agency.

Q. In New York City? A. In New York City. Then, after that I went with the William Green Corporation as an account executive. They did work for transportation companies and also for industrial organizations.

Q. And then? A. Then I went with the Johns Manville organization as their publicity and public relations man for six years.

Q. And then? A. Then I went with Guaranty Trust Company of New York City as the advertising man for the Fifth Avenue and Madison Avenue offices.

Q. What years was that employment with the bank? A. Let's see. That was in 1929 to 1945, I believe.

Q. What was your salary on that Guaranty Bank job? A. It was, it began with five thousand and bonus, and when I finished, it was seven thousand and bonus.

Q. When you left the bank where did you go? A. I went with the Kent State University.

Q. Was that your first teaching job since the three years immediately following your graduation from Yale? A. That was my first
10 teaching job, yes.

Q. Up to this point, your going to Kent to teach, had you ever been

unemployed for any appreciable length of time following your graduation from Yale? A. No.

Q. You had been continuously employed? A. Yes.

Q. At Kent University, what was your job? A. Professor of advertising, marketing, and market research.

Q. What was your salary? A. Well, it started with 4800 -- that was including summer school -- and then, when I left, it was 5600.

Q. When you give these salaries, is that for a full year or for nine months? A. No, that was for, that included the summer school.

Q. Summer school. So that would be for the academic year plus summer school? A. Plus summer school.

Q. How did you happen to leave Kent? A. Because I had a chance to come to Washington, and I had wanted to do it, and I took the offer at American University.

Q. Is Kent a State university? A. It is a State university.

11 Q. Were you a member of a pension plan there? A. Yes, the university had a regular pension plan.

Q. You were a member of it? A. And I was a member of it.

Q. And you made contributions to it? A. I did, regularly.

Q. How did you come to learn of this opening at American University in Washington? A. By writing.

Q. And when did you come to American University? Can you give the month and the year? A. It was September 1953, I think.

Q. September 1953? A. Yes.

Q. So that you had been on that job from September 1953 to June 1954 when this accident occurred? A. That is right.

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26 Q. Were you in front of the truck? A. Yes, I was.

Q. What did you then do? A. I jumped as best I could to avoid being run over, over a portion of my trunk.

Q. Did you continue in the direction that you had been walking?
A. I continued in the same direction by jumping to get out of the way.

Q. Will you describe just how you did jump? A. Well, I thought

the best thing to do was to jump in a northerly direction, because the truck was coming down rather rapidly, and so I jumped to avoid having the truck go over my body, which would have killed me if it had. So then -- shall I describe it further?

Q. Describe further what happened. A. Then the bumper hit my body and knocked me down.

Q. Will you stand up and show us where it hit you, where the bumper hit you? A. Well, I can guess now. (Standing) It was about here, I should say. (Indicating)

Q. Was in your left thigh, you are indicating? A. Yes. I was going north, so it would be the left. And it knocked me down immediately, 27 and I fell in the direction in which I was jumping, and I fell flat, and so flat that both feet were on the ground, and the truck ran over both of those feet. I saw the wheel go over my legs.

Q. Sit down, Mr. Christie. When you were knocked down by being struck in the left thigh by the bumper, where did you fall? Were you still in the driveway? A. I fell out toward the road. I fell in a northerly direction.

Q. Now, that driveway, was that graded so that it sloped down toward the roadway? A. Yes, it graded. And I jumped far enough to reach the gutter.

Q. Did your head hit anything? A. Well, it hit the road, because I fell right out into the road when the bumper hit me.

Q. Were you unconscious at any time? A. No, my head was not hit. It just hit the road, that's all. It was not --

Q. After you were knocked down, what happened to the truck?
A. The truck stopped immediately after it went over both my legs.

Q. And you saw this truck go over your legs? A. I saw that, ab- 28 solutely.

Q. Which wheel was it, Mr. Christie? A. It was the front left wheel. Let's see. To the driver's left, yes.

Q. Now, how long after the wheel went over your legs did it take for the truck to stop? A. Oh, it didn't take long. He stopped almost

immediately after it went over.

Q. So that when he stopped, where were your legs with respect to the truck? Were they under the truck? A. They were under, between the back and the front wheels.

Q. And under the truck? A. And under the truck.

Q. And what portion of your body, and how much of your body was outside the truck's --- A. All the rest of my body was out beyond the truck.

Q. Well, when the truck stopped, what happened? A. What happened?

Q. Yes, what happened? A. Well, I stayed there, I was afraid to move, and I said, "Is anybody going to help me up?" and then the driver said, "Yes, I'll help you up," and he jumped down.

Q. You heard the driver say something. Where was he when he said whatever he did say? A. Well, let's see.

29 Q. Was he in his cab?

MR. RICHARDSON: If Your Honor please, let the witness answer the questions.

A. He said, "I'll help you up," and he assisted me up into the truck. Then he said, the first thing I think he said was, "I didn't see you." Then he said, "What hospital --" I was bleeding quite rapidly from both legs, and the blood was going over my trousers, and he said, "What hospital would you like to go to?" I said, "I don't know. Any of the hospitals around here." He said, "Well, how about Georgetown?" because he thought that was nearer, I think. I said, "All right, we'll go to Georgetown."

There was some other conversation. I was trying to think what it was. Oh. I said, "This is a terrible time for me to have anything like this occur," because I was in the process of getting a job down in Texas.

BY MR. WALSH:

Q. Did you ask him why he hit you? A. Well, he said, "I didn't see you."

Q. Did he say anything about, anything else about hitting you?
A. No, not that I can recall, no.

Q. Did he say anything about the wheels going over you? A. Oh, he said, "It felt like I was going over a barrel."

30 Q. Now, when you first heard his voice, where was he? A. Well, he was up, sitting on the seat of the truck.

Q. And did you see him? A. Yes, I looked up at him. I was on the ground.

THE COURT: Would this be a good time for us to find out what kind of a truck it was? Do you know?

THE WITNESS: It was a, well, something like a gravel truck, to me. I am not very well versed on trucks.

THE COURT: I thought maybe you knew. All right. Well, was it a delivery truck or a stake body truck, or a --

THE WITNESS: The seat of the truck, of the driver, was very high.

BY MR. WALSH:

Q. Will you describe the truck? A. I noticed that the driver sat very high on the seat. I didn't see what kind of a truck it was except that it looked like the typical gravel truck, to me. I am not very well versed on the different kinds of trucks, but it --

THE COURT: All right. You don't know whether it was a delivery truck or some other kind of a truck?

THE WITNESS: No. It was quite a large truck.

THE COURT: I see.

31 MR. RICHARDSON: What was that? I didn't hear what he said.

THE COURT: He said a large truck.

BY MR. WALSH:

Q. Mr. Christie, the driver of that truck, is he here today?
A. Yes.

Q. Will you identify him, point him out, please? A. I think he is the first man there.

Q. You are identifying the defendant, Mr. Haycock? A. Yes.

MR. WALSH: The record will show he is identifying the defendant, Mr. Haycock, as the driver.

THE COURT: Yes.

BY MR. WALSH:

Q. When you left the scene of the accident in the truck, where did you go? A. We went to Georgetown Hospital.

Q. Were you feeling any pain? A. I was feeling a great deal of pain.

Q. Had your clothes been torn or bloody? A. My trousers had been torn, and they were bloody.

Q. Was any property broken or destroyed? Did you have any on your person? A. No, except my glasses flew out of my pocket, and
32 were scratched considerably from going across the road.

Q. Were they thereafter usable? A. Well, I have been able to use them but they were in pretty bad condition. The doctor said I shouldn't.

Q. When you arrived at Georgetown Hospital in the truck, how did you get inside the hospital, if you did? A. By the aid of one of the orderlies and one of the nurses.

Q. And where did they take you? A. They took me into the emergency room, put me on a stretcher.

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34 Q. Mr. Christie, were you put to bed in Georgetown Hospital?
A. Yes, immediately.

Q. And was that the same day of the accident? A. Yes.

Q. And did you remain in Georgetown Hospital? A. For a month.

Q. One month. Did you receive any treatment from a physician?
A. Yes, from Dr. Rush.

Q. Is that Dr. Robert Rush? A. That is right.

Q. Did he treat you in the hospital? A. Yes, every day.

Q. He saw you every day? A. Sometimes twice a day.

Q. How long did you remain in bed? A. Almost the entire time.
In fact, I couldn't get out of bed.

35 Q. Did you get out of bed for any purpose, any personal needs?
A. No.

Q. Did you feel any pain during this period? A. I had a great

deal of pain while I was in bed, especially at night, and it was bleeding, a running sore. It was a great deal of pain, which they had to give me sleeping pills, to sleep.

Q. Did there come a time when you were able to get out of bed?

A. Not until the end. I mean after I had been there a month. Then they let me up in a wheelchair, and I had to be helped by the nurses to get in the wheelchair, or the orderly, rather.

Q. And then did there come a time when you left the hospital?

A. I was in the wheelchair and on crutches for about a week before I left the hospital after I had been in bed, and the doctor said it would take three days to learn how to use the crutches properly.

MR. RICHARDSON: May it please the Court, I have stipulated with Mr. Walsh that he would not have to bring anyone from the Georgetown Hospital to identify this bill on the part of the hospital.

THE COURT: Do you stipulate that it is a reasonable bill?

36 MR. RICHARDSON: Yes.

THE COURT: Very well.

BY MR. WALSH:

Q. Mr. Christie, I show you this and ask you to identify it, please.

A. Yes; that is the bill from the hospital.

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37 BY MR. WALSH:

Q. When you went back to your apartment, did you continue to be treated by Dr. Rush? A. I was treated by Dr. Rush for about seven months afterward. He had me come in three times a week for the first three months, and then I went for the next three months, I was there two times a week. Then, for the last month, I was there once a week. So it was for seven months, all together.

Q. Following your return home, was it possible for you to get around on your own transportation? A. For a month and a half I couldn't go anywhere except by taxi, or somebody who was kind enough to bring their car around and I went with them.

Q. And how much a day did you spend on taxicabs? A. Had to go

to all my meals. That was three times a day, by taxi.

38 Q. That was a total of how much a day? A. That was about three dollars a day.

Q. For a month and a half? A. For a month and a half.

Q. Mr. Christie, had you planned or intended to return to American University for the ensuing academic year beginning in September 1954?

A. No. In March I had thought that I would -- It didn't offer me the opportunity that I wanted, and I started to correspond with other universities. Leading among them was the Texas University, Texas University at Austin.

Q. Mr. Christie, did you tell anyone at the university that you would not be back? A. I didn't say that I would not be back, but I said that I was thinking of elsewhere.

Q. What is the customary procedure for college professors to seek employment at another college? A. Well, usually it is done in the early spring, beginning in March, April, May, and by June nearly all the appointments are usually made. During the month of June they might very easily be made. And that was the critical time for me, because that was the time that I was down flat in bed, and my correspondence had to be all given up.

Q. Had you corresponded before the accident? A. Oh, yes.

39 Q. Well, how many letters did you write, if you can approximate the number? A. I wrote, I would say, at least seventy-five.

Q. And did you receive any replies to them? A. Yes. I was looking for openings, and that is the way it is usually done, rather than go to an employment agency.

Q. While you were in the hospital, did you have any colleges in which you had hopes of getting a job? A. Yes. The Texas University, I thought, was going to be it, and I thought it was so near to being a sure possibility that I would hear from them most any time, that they expected me to come down there. But I found out later that they found a local man because they hadn't heard from me during the time. See, during that whole month they hadn't heard from me.

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Q. Well now, when you were in the hospital, were you able to engage in any correspondence directed toward obtaining employment in colleges? A. Well, I did, but I didn't do it until I was able to. I did

40 it finally the last week, I believe, that I was in the hospital, I had a stenographer come in, and I continued to write.

Q. And that was in --? A. That was the last week in the hospital.

Q. The last week in the hospital? A. Yes.

Q. That was in July? A. Yes. That was June.

Q. June. A. Yes.

Q. When you were discharged from the hospital, did you make any efforts immediately to pursue this search for a job in a college?

A. Oh, it couldn't be done. I was in too much pain to do that.

Q. Did there come a time when you were able to get around under your own power, without crutches or cabs or -- A. Yes, but that was a month and a half after I had been going to the -- Well, when I was using a taxi, I used a taxi for a month and a half, in order to go anywhere.

Then, after that, I was able to walk very slowly and get around by the help of other people. I had to have people help me across the street, for instance, whenever I went out alone, and it was rather embarrassing sometimes to wait for people to help you across the street. That lasted

41 for about, oh, a month. Then, after that, I was able to get around myself. But that was a long time after.

Q. Mr. Christie, when did you stop drawing salary from American University? A. About a week after the accident.

Q. Did you have any other source of income at that time? A. No.

Q. How did you live? A. Well, I lived by drawing my pension out of Kent State University, or out of the pension fund in Ohio, the State of Ohio.

Q. How much was that, approximately, if you know? A. It was about \$1500; and they advised me very strongly not to do it, but I had to do it.

Q. Did you have any savings of your own in a local bank or --

A. I had, yes, about six hundred dollars.

Q. And what became of that? A. It was all used up in living.

Q. How much rent did you pay in your apartment? A. \$75.

Q. And what became of the approximately \$1500 which you drew out of the pension fund in Kent? A. It was used for living, completely.

42 Q. Did you have any other source of funds at that time? A. No, I had no other source at all.

Q. Did you borrow any funds? A. Yes, I borrowed from two banks, and also from a friend.

Q. How much did you borrow from a friend? A. About a hundred dollars.

Q. Was he a neighbor? A. Yes.

Q. What banks did you borrow from? A. I borrowed from the National Metropolitan Bank and the National Bank of Washington.

Q. How much did you borrow from the National Bank of Washington? A. About two hundred dollars.

Q. And from the National Metropolitan Bank? A. Well, now, let's see. That was about four hundred, I believe.

Q. As a total? A. As a total.

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43 Q. Were you willing to take a nonteaching job? A. Oh, yes.

Q. Why were you willing to take a nonteaching job? A. Well, because there aren't many openings constantly in the teaching field in universities. There may be in the secretarial schools, but not in the universities.

Q. That is, after the beginning of the academic year? A. Yes.

Q. There are no jobs open? A. After you pass June it is very difficult to get an opening in a college.

Q. You were willing to seek and fill other employment? A. That is right.

Q. Did there come a time in the winter of 1954-55, following the accident, when you fell behind in your rent at the Chancery Apartments? A. Yes. I fell back two months in my rent, and I had to borrow that

money from the bank.

Q. When you fell behind two months, did the apartment take any action, legal or otherwise? A. Yes. They threatened to put me out, and they did.

44 Q. And they did? A. Well, they attempted to.

Q. Did they file suit? A. They filed suit.

Q. And did you pay up the back rent? A. Then I borrowed from the bank and paid.

Q. Did there come a time in the spring of 1955, following the accident, when you went to the Veterans Administration? A. Yes. In the spring of 1955, about March, I went there to see if I could get the pension, or the disability pension, and they examined me by two doctors, two or three doctors, and said that they were willing to put in the claim for me for the disability pension. Then, this friend of mine from New York invited me to come and stay with him during the summer, and at the end of that summer I received a lump sum from the pension of 66-fifteen a month for three months.

Q. Now, following your examination by the Veterans Administration doctors, were you informed that you would be granted a disability pension? A. Yes. He said, "I will grant you a permanent disability pension."

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45 Q. Mr. Christie, what was your salary at American University, if you remember? A. It was -- I thought I was going to get summer school there, and I intended to -- It would have been 4,450.

Q. How much was it for the nine months ending in June? A. \$3,450.

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Q. Did you have any other alternative opportunity to work that summer? A. Yes. I had an opportunity to go up to Portland, Maine, on a personnel job there.

46 Q. How much would that have paid for the summer? A. That would have paid me about a thousand dollars.

Q. For how many weeks, Mr. Christie? A. How many weeks?

It would have been months. I think two months and a half.

Q. About ten weeks? A. Yes.

Q. And what was the name of the man who was going to help you get that job? A. Mr. Thayer.

Q. And had he written to you about it? A. Yes, he had.

Q. Now, Mr. Christie, you stated that you made certain efforts to get a noncollege job in Washington in order to pay your living expenses.
A. Yes.

Q. What was the condition of your legs at this time? A. Well, they were not very good. I had a great deal of pain at night when I was trying to get some sleep and couldn't, and then it was difficult to go around and look for a job, even though I could walk, because of the lack of sleep and the pain it gave me while I was walking. Quite often it hemorrhaged at night, and there would be a pool of blood both in the bed and on the
47 floor, from hemorrhages. It was an abscess that had developed there, and it was a very large abscess.

Q. Professor, was it in accordance with Dr. Rush's orders and instructions that you walk around the city? A. Well, he said I had better try to stay off it as much as possible.

Q. Well, why didn't you? A. I didn't because I had to live. You can't live and stay at home.

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50 Q. And then, that was discontinued when you informed them you were going to make 1400 a year? A. That was discontinued as soon as I informed them.

Q. Now, during this time following your going to Winter Park, were you able to pay any of the bills related to your accident? A. I couldn't even pay all of my living expenses, so I didn't pay the bills.

51 Q. By the way, did Dr. Rush ever render you a bill? A. Yes, he did.

Q. Do you know how much it was? A. It was \$325.

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Q. Following your departure from Washington for Scarsdale, did

there come a time when you experienced symptoms of pain, bodily pain, --

A. Oh, yes.

Q. -- other than your legs? A. Yes. For a long time, regularly, I had felt gnawing and burning pains in my stomach.

Q. Well, when was this, Professor? A. Oh, --

Q. When did you first notice this? A. It was about a year ago.

Q. About a year ago? A. Yes. And I didn't know what it was. I thought it was probably severe indigestion.

52 Q. Was this before you arrived in Winter Park? A. It was just about -- shortly after that time.

Q. Will you describe these symptoms, please? A. Well, they usually would happen after meals, after lunch as a rule. In the mornings it wasn't so bad, but after lunch and after dinner, I had terrific pain. I thought it was simply that I didn't know how to eat, or I wasn't eating the correct things. Then they kept persisting, so I knew there was something wrong, finally, and I got a terrible cold, it was flue, with a fever, and I thought I had better go to the doctor. I had felt lack of energy and lack of vitality, and I went to the doctor, and he gave, took a blood count and a cardiac treatment, and I had no more than gotten home after I had been to his office when he called me up and he said, "Go to the hospital immediately." He said, "You are in a very bad way from a bleeding ulcer," and he said, "You would collapse if you kept on doing the work that you were doing."

It was all a great surprise to me. I immediately packed up and went to the hospital.

Q. Do you remember what date that was that you went to the hospital? A. That was October the 19th.

Q. 1956? A. Yes.

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53 Q. Well, you had been experiencing these pains, but you continued to work? A. I continued to work. And he said that was the worst thing I could do, that kind of work.

Q. Well, the doctor sent you to the hospital on October 19th. What

happened in the hospital? A. Well, they gave me X-rays to find out --

Q. Do you know how many X-rays they gave you? A. They gave me about ten X-rays, I believe.

Q. What else? A. Then they gave me antibiotics, a great many of them, and blood transfusions.

Q. How many blood transfusions? A. I had four blood transfusions, and I felt new life coming back the minute I got them.

Q. How long did you remain in the hospital? A. I was there twenty-six days.

Q. When were you discharged? A. November the 14th.

Q. Were you rendered a bill by that hospital? A. Yes.

Q. What was the total amount, if you know? A. The total amount was about \$600.

54 Q. Did you know the daily rate for the room? A. The daily rate was twelve dollars.

Q. For twenty-six days? A. It was a semi-private room.

Q. And that was for twenty-six days? A. Twenty-six days.

Q. Do you know what the cost of the X-rays were -- the charge, rather? A. The X-rays came to about \$90.

Q. And do you know what the charge for the four blood transfusions were? A. They were \$35 for the first one and \$25 for all the other three.

Q. For each of the other three, or all of them? A. Each of the other three.

Q. Do you know what they charged for the laboratory work, the blood count? A. The blood count? I have forgotten, but it came to about \$70, I believe.

Q. And the antibiotics? A. The antibiotics were about \$40.

Q. Now, have you paid this bill? A. No, I haven't.

Q. Have you paid any of it? A. I can't-- what's that?

55 Q. Have you paid any of it? A. I haven't paid any of it, no.

* * * * *

Q. Did Dr. Ramsey treat you? A. Yes, he treated me, and he

still is.

Q. How often did he treat you? A. Every day.

Q. Every day while you were in the hospital? A. Every day while I was in the hospital.

Q. Did you visit him at his office? A. Three times.

56 Q. What other treatment did he give you, other than that?

A. Well, he found from the condition of my general condition, he said there was a spot on my lungs, and he is going to doctor me for that now.

Q. I am referring to what treatment he gave you. Did he take any tests? A. Oh. He took blood counts and urine tests, and he examined the stool.

Q. Did he render you a bill? A. Yes.

Q. And do you recall how much that was? A. \$177.

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57 Q. Who examined you when you first arrived in Washington?

A. Dr. Sullivan.

* * * * *

Q. Did he render you a bill? A. Yes.

Q. How much? A. \$50.

Q. And have you paid that? A. No.

58 Q. Were you subsequently examined by Dr. Rush? A. Yes, I was.

Q. Will you describe -- A. Well, Dr. Rush looked at my leg where it was injured, and he found that the sore was still there, after two years, that it was still in an inflamed condition. That was where the abscess was on my leg.

Q. Prior to this accident, had you ever had any physical disability of any consequence, any serious nature, illnesses? A. Nothing to speak of at all.

Q. How about your digestive system, the stomach? A. My stomach was cast iron.

Q. Did you have any difficulty with eating? A. Not at all, never. That is the reason it worried me.

* * * * *

65 Q. Were your clothes ruined? A. Yes, they were.

Q. What were you wearing? A. A light suit.

Q. What was the value of that suit? A. About \$80.

66 Q. And you have testified that your glasses were injured. A. Yes, they were.

Q. What happened to them? A. They were scratched so badly that you could hardly see through them.

Q. What was the value of those glasses? A. \$35.

Q. Now, you have testified that when you went to Florida in October, you thereafter found employment. When did you actually find employment with this newspaper? A. Right after New Year's, the day after New Year's.

* * * * *

67 BY MR. WALSH:

Q. Do you know how much you made from January 1 until you went into the hospital, a week? A. On an average, I think it would be, about \$45 to \$50. That is an average.

Q. At this time, speaking of the immediate present, yesterday and today, perhaps, what is the condition of your legs? What trouble do you have with them, if any? A. Well, the left one pains considerably now and then, and it is still sore. It is inflamed, and it has not healed completely.

68 Q. Do you have any other difficulty with them? A. The right one is swollen considerably, so that I notice it when I put on my shoes. The swelling has never completely gone down.

* * * * *

Q. What is your physical condition and nervous and mental condition with respect to holding down a job as a college professor at this time? From your knowledge of the job, could you hold one down now with -- A. Well, the nervous tension would certainly make it quite difficult to draw yourself together enough to get up before a class.

* * * * *

69 MR. WALSH: This is a carbon copy of a contract signed by Hurst R. Anderson, president of American University, addressed to Mr. R. B. Christie, Kent State University, Kent, Ohio, dated September 14, 1953:

"Dear Mr. Christie:

"It has been my pleasure to recommend to the Board of Trustees the following contractual arrangement for you:

"Position and Rank: Assistant Professor of Advertising.

"Salary: \$3,450.00 for services during the fall and spring sessions, 1953-1954.

"Effective: September 15, 1953.

"Period: September 15, 1953 - June 30, 1954.

70 "If the appointment meets with your approval as described above, will you please sign on the line provided for the purpose on the attached copy and return it to my office as soon as possible."

BY MR. WALSH:

Q. Mr. Christie, did you sign the attached copy and return it?

A. I did.

Q. And that constituted your contract of employment? A. That is right.

Q. Mr. Christie, while you were in the hospital thereafter, did you make any efforts to secure a job at a college as a professor? A. I did, at the last week of the time I was there. As I said yesterday, I had a stenographer come in at that time, because I was getting over the pain of the first part of the hospitalization.

* * * * *

72 CROSS EXAMINATION

BY MR. RICHARDSON:

* * * * *

82 Q. Professor Christie, when was it, when was the earliest date that you decided to leave American University? A. I think it was around March.

Q. And March of what year? A. 1954, it was.

Q. And that was the same year in which this accident occurred, wasn't it? A. Yes.

Q. (Continuing) -- this accident occurring in June? A. Yes.

83 Q. So then, as of March, you had decided not -- A. Well, I hadn't exactly decided. I had thought that I would like to go where there were more opportunities.

Q. Again I refer to the deposition, on page 41:

"Did you make any attempt to go back to American University in September of 1954?

"Answer: No, I had already told them I wasn't.

"Question: When was that?

"Answer: Back in March.

"Question: You told American University in March of 1954 you were not going to teach there in September 1954?

"Answer: Yes.

"Question: Is that right?

"Answer: Yes."

A. As near as --

THE COURT: Wait just a minute. He simply read something. Now, the next question is, did you make those responses to those questions?

THE WITNESS: I did.

THE COURT: Very well.

* * * * *

88 Q. How and just when did you see the left front wheel go over your legs? A. I could see the wheel pass over my leg, and my leg was on top, one was on top of the other, and therefore, the left leg got all of the brunt of the wheel, but the right leg was affected also.

* * * * *

89 Q. Did the driver of the truck carry you to the cab? A. Yes.

Q. He picked you up off of the street and carried you to the cab? A. Well, he helped me get in.

Q. Did you walk? A. I did not. I made an effort. That's all I

could do.

Q. I am asking you, did you walk from the place you fell? A. I didn't walk. I leaned on him completely, as you would on a crutch.

90 Q. Were your feet on the ground? A. Well, they dragged on the ground, yes. I wasn't walking any more than an injured man would walk.

Q. Did you take steps? A. I don't recall.

Q. Is it your testimony that the driver dragged you from the place that you fell? A. He didn't drag me; he helped me, and I made --

Q. Well, how did you get there, Professor Christie? Explain to the Court and the jury. A. Why, I leaned on him as you would on a crutch, and he helped me get from the, the short distance it was to the side of the truck, to get in it, and he lifted me up.

Q. He lifted you up where? A. Into the seat.

Q. He lifted your body up into the seat? A. That's what I remember.

Q. Did you take any steps at all? A. Well, I might have taken one or two steps, yes. You can.

Q. Now, when you got to the hospital, -- and Emergency Hospital was the hospital, wasn't it?

THE COURT: No, Georgetown.

MR. RICHARDSON: Georgetown; I beg your pardon.

91 BY MR. RICHARDSON:

Q. (Continuing) -- Georgetown Hospital, how did you get from the truck into the hospital, by way of movement, now, of your body? A. The same as I did before, with the aid of an orderly and a nurse.

Q. Did the driver of the truck help you in any way? A. No, he didn't.

Q. Did the driver of the truck go in the hospital? A. He went in the hospital, but not in the emergency room.

Q. But he did not help you go in the hospital at all? A. Well, not that I remember, no.

Q. And did you take any steps from the truck? A. Slightly. I

made effort. They were painful, and therefore you only make an effort.

* * * * *

92 Q. Is it not a fact that you had written letters seeking other employment as early as March of 1954? A. I believe it was in that month.

* * * * *

100 Q. Professor Christie, I present to you this photostat copy of an instrument, and I ask you whether or not this correctly sets forth the universities and organizations that you wrote to, seeking employment, from the time before the accident, and I ask you to fix until what time.

A. These are some of them, of the universities I wrote to, and they are some of the places that I went to, here in Washington, as well.

Q. So that is a correct statement of some of the places --

A. Some of them, that is right.

Q. -- that you contacted? A. That is right.

Q. You contacted every one, every organization and college and university listed on that sheet? A. These were by writing; these were by actual contact. (Indicating)

Q. Did you contact all of them? Did you? A. Yes.

Q. I see. With reference to seeking employment? A. Yes.

101 Q. And did you get employment with any of them? A. No, I didn't.

THE COURT: Now, this was all before the accident?

BY MR. RICHARDSON:

Q. This was from a time before the accident that you wrote these?

A. Oh, no. This wasn't all before. Some of them were, and some were after.

Q. Professor, it was from a time before the accident until what time? That is what I want to know. A. I don't know the exact time of those.

Q. But some of these you wrote -- A. Some of them before and some after.

* * * * *

Q. Professor Christie, at the time of the accident, did you have any commitment from any college or university with reference to employment? A. No definite commitment, but it was one that I thought might break.

Q. And with what organization or university? A. The Texas University at Austin.

Q. You say it wasn't a definite commitment, but you thought it was one that would break? A. Yes.

Q. Will you further explain that? A. Well, from what they had said, I could judge between the lines that they were interested in my background and they wanted to know what the possibility was to consider an opening, and then a friend of mine who teaches there, who was a professor with me at Kent, wrote to me and said that he thought they were going to take me.

Q. But you had no definite commitment from them? A. No definite commitment. I was waiting for that, at the time of the accident.

109 Q. And from no other college did you have that? A. No, not as definite as that.

Q. Not as definite as what? A. Well, I mean there was nothing where there was an opening and they were considering me at the time. You have to find the openings. That is what I wrote all those letters for.

Q. There was no opening where they were considering you? A. No openings where there was a possibility of my fitting in their program.

Q. I see. Professor Christie, within your recollection did you, in any of your correspondence with organizations, colleges and universities, after the date of the accident, mention to such organizations, colleges or universities, any physical disability on your part? A. No, I didn't mention it.

Q. Then, it is a fact that despite the accident, you were seeking a position -- A. Oh, yes.

Q. -- as an instructor? A. Absolutely. I was seeking it.

Q. When was the first time that you could physically assume the

duties of an instructor after the accident? A. Well, regardless of
 110 what I thought, the doctor --

Q. I am just asking you the question, Professor Christie. You
 give me the answer, please, sir. A. Well, state that again, will you?

Q. When was the first time after the accident that you felt that
 you were physically able to fulfill the position of an instructor?

A. Well, I went after a position before I thought I was physically able.

THE COURT: That is not responsive, Doctor.

THE WITNESS: No?

THE COURT: Will you make a responsive answer. If you don't
 remember the question, it will be read back to you.

THE WITNESS: Read it once again, or say it once again.

MR. RICHARDSON: Let the reporter read it, please.

THE REPORTER (Reading):

"When was the first time that you could physically assume
 the duties of an instructor after the accident?"

THE WITNESS: Well, I didn't feel physically able, but I went
 ahead and did it.

THE COURT: Will you answer the question? Was there ever a
 time when you felt physically able to resume the duties of professor?
 That is what he wants to know; and if so, when?

111 THE WITNESS: I would say about six months afterward.

THE COURT: All right. Now, does that answer your question?

BY MR. RICHARDSON:

Q. And what month would that be? A. About December.

Q. I refer back to the deposition, page 42: (Reading:)

"Question: As far as the accident was concerned, were
 you able to return to work as of the academic year beginning
 in September 1954?

"Answer: Well, I think I could. I don't know.

"Question: You think you could?

"Answer: It all depends on what I have to do. If you have
 to stand before a class, no. Some colleges require you to stand.

Others will allow you to sit down."

Did you make that answer?

A. That is the point. That is exactly the way I answered before.

Q. I see. Further: (Reading:)

"When did you first feel you had recovered from the accident and could stand up and teach?

112 "Answer: I never felt I could stand up during a whole lecture and teach. I would have to sit down.

"Question: Up to the present time?

"Answer: Up to the present time. Now, I probably could."

And this deposition, for your information, was taken February 19, 1955. So in that you claim --

THE COURT: Did you give those answers?

THE WITNESS: Yes.

* * * * *

113 Q. (Continuing) -- what, within your knowledge -- Now, don't give us what any doctor said, because I want just within your knowledge. What was, within your knowledge, the disability for which you were getting a pension? A. The disability was that I, it was very difficult for me to stand in front of a class and lecture.

Q. And that was the disability that you were getting payment from the Government for? A. Well, the disability was, it was difficult to walk, even; but I was thinking about employment.

Q. And was your claim with the Veterans Administration with reference to disability of your legs? Was that disability concerning this accident? A. Yes.

* * * * *

114 Q. * * * * When did you arrive in Florida the first time?

A. October 1st.

Q. Of what year? A. 1955.

Q. And when did you get your first position there? A. January; January 2nd, I believe it was.

Q. Of what year? A. Nineteen-fifty- Oh, no; that was 1956.

Q. Did you make any mention to any of the organizations, persons, colleges or universities that you contacted down in Florida, did you make any mention to them of the accident and any resulting physical disability?

115 A. No. I say, I would be foolish if I did that. I wouldn't get the job.

Q. Professor Christie, you testified concerning summer school at American University, and you also testified that you had told or had some conversation with someone at American University along the line that you were not going to continue there. A. Yes, I did.

Q. Well, now, -- A. That doesn't -- Go ahead.

Q. I want you to reconcile this: If you had discussion with them concerning not continuing there, how was it, then, that you had thoughts about summer school there? A. Because that is the usual way it is done. They don't, simply because you are thinking of leaving in September doesn't mean that you are not going to get summer school if they have enough registration. That is the usual way in all colleges. Your year goes on for the summer school, until September.

Q. Well, what discussion did you have concerning summer school?

A. I asked them whether they were going to have a summer school, and they said yes, and if there was enough registration, they believed they would have some classes in advertising and marketing, but they didn't know what the registration was going to be.

116 Q. Did you have any definite commitment with them? A. No definite commitment; only that way, that if there was a registration, it looked as if I might get the classes in marketing and advertising.

Q. And did you express a willingness to take those classes? A. I didn't say no.

Q. Did you say yes? A. Well, they didn't, they hadn't, they didn't know whether they were going to have them.

Q. Did you express a willingness to take the classes if they occurred? A. I said I would like to have summer school classes, yes.

Q. And to whom did you say this? A. I am not sure whether it was Mr. Bailey or Mr. Levin. I am not sure who it was. It was just

an offhand remark. One afternoon I was talking, and I said I would like to get summer school classes.

Q. Was there any discussion about the compensation? A. No, but the usual compensation --

Q. Just a moment, Professor. You said no, is your answer?
A. No.

117 Q. What was the usual compensation, if you know? A. Well, I mean in other universities, --

Q. If you know, with reference to American University, what was the usual compensation? A. I don't know what American University did, but I know that --

Q. Just a moment.

THE COURT: Don't go beyond the question. Your counsel can take up whatever is necessary on redirect.

BY MR. RICHARDSON:

Q. So then, you did not know -- A. I did not.

Q. (Continuing) -- how much money -- A. No.

Q. (Continuing) -- you would be paid for what duration with reference to summer school? A. No. I didn't even know whether I was going to have summer school.

* * * * *

118 Q. I see. Now, you testified that you had stomach pains, that they started about a year ago, shortly after you arrived in Florida. A. Not shortly after I arrived. I had them for about a year, --

Q. From what date? A. (Continuing) -- to the present date.

Q. From about a year ago until today -- A. Yes.

Q. (Continuing) -- you had the stomach pains; is that correct?
A. Yes. And I went there in October.

Q. October. So, about November of last year you started to having the stomach pains; is that correct? A. That is right.

* * * * *

120 THE REPORTER: (Reading)

"What, with reference to your physical condition, do you

attribute to the accident?"

THE WITNESS: Anything at all, do you mean?

MR. RICHARDSON: Answer the question.

THE WITNESS: Well, I attribute the nervous tension completely to the accident, and that brought on the ulcer, because I have been in an extremely nervous state ever since the accident. The shock of the accident gave me a very great nervous shock, and it affected me a great deal. Since that, because of my loss of earnings, I have had a great deal of nervous tension also, which increased it, and I still have it.

BY MR. RICHARDSON:

Q. Is there anything else? A. Well, that is the, I would say is the greatest thing. I do think also that my spine was injured when I fell.

121 Q. Anything else? A. No.

* * * * *

126 REDIRECT EXAMINATION

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THE COURT: Read it to the jury. It speaks for itself.

MR. WALSH: Well, all right. This is the text of an advertisement placed by Mr. Christie in the American Association of University Professors Bulletin, Volume 40, No. 2, Summer 1954, at page 345:

135 "Business Administration or/and Journalism: Professor of Advertising, Marketing, Market Research, Public Relations, and Sales Promotion. Extensive practical experience with several large New York organizations of worldwide reputation, and nine years' university teaching experience. Consultant. Considerable placement work with students."

BY MR. WALSH:

Q. Mr. Christie, did you place that advertisement? A. I did.

* * * * *

136 Q. Was this advertisement placed before or after the accident?

A. That was the summer, 1954, so it was after the accident, then -- if that's the summer. Is that publication the summer?

Q. This is the summer issue. A. It doesn't say what month,

does it?

Q. No. A. Well, then, it was after the accident, I should judge.

Q. Mr. Christie, Mr. Richardson showed you copies, photostatic copies of letters, correspondence regarding your requests for employment, both before and after the accident. Do these comprise all of the written efforts you made to get a college job? A. Not all of them.

Q. Do you now or did you at any time have copies of the letters you wrote or the originals of those you received? A. I have copies of all that I wrote, but I couldn't find all of them.

* * * * *

139 THE COURT: All right, go ahead. Read them all.

MR. RICHARDSON: And give the dates.

MR. WALSH: There are no dates on page 3.

THE COURT: Start reading.

140 MR. RICHARDSON: Start with page 1, Mr. Walsh, and read right on through to page 3.

MR. WALSH: Well, they are separate matters. Page 3, Defendant's Exhibit No. 2 for identification:

Georgetown University, George Washington University, the University of Virginia, University of Tennessee, Catholic University, University of Florida, Rensselaer Polytechnic, Hawaii University, University of Arizona, Boston University, Japan International Christian University, Sofia University; University of Bergen, Norway; University of Edinburgh, Scotland; University of Detroit, Arizona State College, University of the Pacific, Claremont Men's College, Pomona College, San Diego State College, San Francisco State College, Stanford University, University of California, Whittier College, University of Redlands, Florida State University, Stetson University, Rollins University, University of Miami, University of Tampa.

Some of the other places, non-college, applied to for employment by Mr. Christie:

American Marketing Association, National Council for

141 Schools and Colleges, Journalism Association, University of Kansas, Baltimore Teachers' Agency, Adams Teacher Agency, College Public Relations Association, Public Relations for Business, American Chamber of Commerce, Washington Board of Trade, Delta Epsilon Alumni Group, Yale Alumni, National Cathedral, Bank of International Settlement, Riggs National Bank, National Bank of Washington, Security Trust Company, Wells Church Fund Raising, McGraw-Hill, Curtis Publishing Company, FOA, Domestic and Foreign Commerce, Agricultural Department, United Travel Company, Thomas Cook, Washington Daily News, Evening Star, Washington Post, American Express, Larabee Associates, J. Walter Thompson Company, American Trucking Company, Association of American Railroads, Air Transport Association, TWA, Pan American, American Express, Mutual of Omaha, Red Cross, American Bankers Association, Financial Advertisers and Public Relations Association, State Bank Organizations, Information Service of Government.

BY MR. WALSH:

Q. Mr. Christie, were any of these places on this list which I have read, here in the District of Columbia? A. A great many of them.

Q. Did you make personal calls -- A. Yes, I made personal calls.

Q. (Continuing) -- on some of them? Mr. Christie, what was the name of the man in Portland, Maine, who was helping you to get a job? A. Mr. Thayer.

142 Q. Do you have any correspondence relating to that? A. I did have, but it was all personal, and I tore it up before I knew you might want it.

Q. Did you discuss your desire and efforts to obtain a teaching job with Dean Bentley of the American University? A. Yes, I did.

Q. Now, from your experience as a college teacher, was this a usual or an unusual number of letters to write for a job of teaching?

A. Well, the usual way, the reason for writing all those letters is to find

the opening. You can't go ahead with looking for a job until you find the opening, and that is why all those letters were written. It is difficult to find the opening.

Q. You testified in answer to Mr. Richardson's question that when you wrote for certain jobs following the accident, you did not mention in your letters the accident or its consequences. A. No.

Q. How were you feeling at that time, physically, at the time you were writing these letters? A. I wasn't feeling too good, but I had to get a job.

Q. Well, why did you write these letters for a job if you weren't feeling physically well? A. Well, I say, I had to get a job.

143 Q. Well, why did you have to get a job? A. In order to live.

* * * * *

145 MR. WALSH: Will you read the question, please.

THE REPORTER (Reading): "Question: Right now, Mr. Christie, could you hold down a job as a college professor in your present --" and then it was broken off.

THE COURT: You mean in his present --?

BY MR. WALSH:

Q. (Continuing) -- in your present condition, physical condition. A. Some days I feel as if I could, and other days I feel as if I can't. It depends on your nervous condition.

* * * * *

RECROSS EXAMINATION

BY MR. RICHARDSON:

* * * * *

146 Q. So, January 1956 was your first employment since the time of the accident. A. Yes, that is right.

Q. Is that correct? A. That is correct.

Q. And from a period of time prior to the accident, up to and including January of 1956, you had been making these attempts to get employment, is that correct? A. When? When did you say?

Q. From a time prior to the accident, -- A. Yes.

147 Q. -- March, to be more specific, -- A. Yes.

Q. -- up to and including January of 1956, you had been making attempts to get employment? A. Yes.

Q. Through correspondence? A. Yes, through correspondence and also --

Q. And through personal calls? A. And through personal calls.

Q. Is that correct, sir? A. That is correct.

* * * * *

149 Q. And after that you were released and discharged from the hospital, and you could not get around without assistance and without going in taxicabs for a month and a half thereafter. Isn't that correct?

A. That is right. That is correct.

Q. Now, during that period of a month and a half in your home, did you write any of these colleges and organizations in your effort to
150 obtain employment? A. Oh, yes, I did.

Q. Why did you write colleges when the season was past? A. Oh, well, you still have the hope of getting in.

Q. Only the hope? A. You see, a great many -- I wouldn't say a great many; some colleges have vacancies suddenly from death and for other reasons, where a professor leaves suddenly, and so you still have the hope that there may be something .

Q. Well, then, there is a possibility after June of getting located in a college? A. There is a possibility, but it is very small.

Q. And that was your reason for writing during that period?
A. Yes.

Q. Now, thereafter did you pursue your efforts to obtain employment in colleges, after the month and a half at home when you were partially immobilized and before the time you could get up and get around without going in taxicabs? A. I did, but it was, kept growing less and less, and went to other organizations, such as those Mr. Walsh read.

* * * * *

151 Q. Then, some of those applications were made in the spring of '55, then, is that correct? A. Yes, they were. See, I wrote to some

of the same colleges the second time, to find whether an opening had
152 occurred since. It is all for --

Q. Well, did you feel then that if you got a position you could perform the duties of the position? A. Well, that was always a question in my mind, whether, in my nervous condition -- It was getting worse.

Q. Then you finally got employed in January of this year? That's '56. A. Yes.

* * * * *

158

DR. ROBERT C. RUSH

was called as witness and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

160

BY MR. WALSH:

A. *** He was admitted to the hospital, where he remained until June the 30th, 1954, and was treated with various dressings in an attempt to prevent and control infection in the wounds of the lower legs. The wounds on the right lower extremity seemed to come along quite readily. On the left lower extremity, however, the pressure caused a large hemorrhagic blister to form, and this blister was opened, and he was treated with a special ointment, and supportive dressings in the form of elastic bandages to support the circulation to the extremity.

Following his discharge from the hospital, he was treated in the office at first at rather frequent intervals, at which time the wounds were redressed and various medications were used on the wounds. It was necessary for him at first to be on crutches to aid in support of the extremities in walking, and then the use of a cane. The additional support of crutches and cane took about a month.

These dressings continued through the early part of 1955. About that time, the wounds on the right lower extremity were doing quite well. However, the wound of the left lower extremity, while the area of, the open area had gotten smaller, there was still considerable opening in the wound at that time.

He was last seen, as far as active treatment goes, on April 1st, 1955, and he was not seen again until November the 19th, 1956, for examination at that time.

161

The examination of November the 19th, 1956, showed that the wound on the right lower extremity was completely healed. The wound on the left lower extremity, there was still a small weeping area on the lateral side, and the patient stated that this was repeatedly irritated by either socks or trousers as they rubbed over it. The skin over the area which had been open, the large area, was quite hard and

crusty, and did not give the appearance of normal skin. It was felt that there was still a diminution of circulation to the skin over the wound.

The left lower extremity was smaller in circumference than the right. The skin on the right side was also discolored, but not to the degree that that on the left was.

The patient also had other complaints at that time: that he felt his posture had become steadily worse since the accident, and also he recently had been hospitalized in Florida for a stomach ulcer. It was my feeling particularly with reference to the wounds of the lower extremities that he still had some disability on the left, and that he probably would continue to suffer from weakness in the extremities, due to circulatory damage of both lower extremities.

* * * * *

162 Q. Is it usual for this condition to persist for two and a half years following its original cause? A. Well, it has persisted that long, and the damage, the soft tissue damage was quite extensive. So it would not, does not surprise me that it has persisted that long.

Q. From your examination, were you able to determine the cause of this injury to the extremities? A. Well, the cause was that given in the history, that the patient had been knocked down and run over by a truck.

Q. But other than his description of what had happened, were you able to determine from your examination of the extremities what type of contact was made that caused that type of injury? A. Well, in general,
163 it would be a pressure force; I mean, a force driving directly -- in other words, impinging the soft tissues between the force and the bone; in other words, just squeezing.

Q. Doctor, could that injury that you found on June 8th be caused by a body falling to a pavement, and the contact with the pavement and the extremities alone, without any foreign -- A. I would doubt if just falling from his standing position.

Q. There would be absent the pressure that you have mentioned?

A. That is right.

Q. Would an automobile or a truck wheel be the type of pressure --

A. That would fit into the pressure, yes.

Q. How often did you see Mr. Christie while he was in the hospital? A. We saw him at least once a day while he was hospitalized.

Q. And do your records indicate how long he was hospitalized?

A. Yes, sir. From June the 8th to June the 30th, 1954.

164 Q. Following his discharge from the hospital, you advised and ordered supports, crutches and cane? A. Well, I did that while he was in the hospital and for the early part of the time following his discharge.

Q. Yes. And how long following the discharge would he require support or aid in walking and in transporting himself? A. In the form of crutches and cane?

Q. Yes. A. Roughly about a month.

Q. And then, following that, would he have free and convenient movement under his own power? A. Well, movement was always difficult, of course. When you have both legs damaged, it does limit your activities.

Q. And you were seeing him regularly, were you not, Doctor, at your office? A. Yes, sir.

Q. And how long did this condition persist, his difficulty in transporting himself under his own power without aid? A. Well, you mean, in other words, his getting around?

Q. His getting around without help, yes. A. Well, he was under rather active treatment from the time of injury up until April of '55, during which time, of course, his activities were increasing; but even
165 at that time he was, I would say he was below normal activity, or should have been.

Q. From your examination of the patient and his injuries, were there any indications that he was suffering pain? A. Oh, yes. He complained of pain repeatedly through here. Open wounds of this type are most frequently painful.

Q. Does that apply also to pain in walking? A. Yes.

Q. Caused by -- ? A. Caused by movement of the tissues in these open wounds.

Q. Doctor, did you render Dr. Christie a bill? A. Yes, sir. The bill has been rendered for \$325 for total care.

Q. That is, what does that include, Doctor? A. That includes his hospital care and office visits.

Q. Those visits every day to the hospital and at least once a day? A. Yes, sir.

* * * * *

Q. Doctor, you spoke of circulatory damage. Will you explain that, please? A. Well, the normal circulation to the skin in the area of the wounds was impaired by the pressure, which of course accounts for the opening up of these wounds for the formation of the blister, and for the persistence of the open ulcer on the front of the leg.

Q. Well, what is the effect of a circulatory damage? You have explained what it is. What is the effect on a person? Is there any physical sensations or pain or inconvenience? A. Well, the results of it do cause the physical sensations of pain, due to exposure of nerve endings in the open wound.

Q. And is there any permanent damage resulting from circulatory damage? A. There would appear to be in this particular instance, due to the changes in the skin, which are still persistent in both legs, and the persistence of a small draining area on the left lower extremity.

Q. When you examined Mr. Christie on November 19th, did you find any swelling of the legs? A. The only mention I have here is that the left lower extremity was smaller than the right lower extremity, at the level of the wounds.

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BY MR. WALSH:

Q. Doctor, following Mr. Christie's entrance into Georgetown Hospital on June 8th, was his condition such that he was required to stay in bed and couldn't get up? A. Yes, initially, yes, sir.

Q. Do you know if he had any difficulty in sleeping? Do you know
168 if he had to take sleeping tablets in order to sleep? A. Most traumatic patients do, due to the excitement. I don't have it specifically, but I imagine he did.

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Q. From your observation and treatment of Mr. Christie, and your experience, would you be able to say whether the injuries that you have described will result in an impairment of Mr. Christie's abilities to lead a normal life, so far as work is concerned, everyday work? A. I would feel that they would impair one in an occupation which would require you to be on your feet considerably.

Q. Would you or have you advised Mr. Christie against being on his feet more than necessary? A. I would.

Q. Would you say that a job which required walking every day would be in the best interests of -- to his advantage in terms of safe-
169 guarding and preserving his health? A. I would say that standing or walking would be, would not be indicated in his care.

Q. Doctor, from your experience, would a man sixty-three years of age, who had suffered the accident indicated by the injuries you observed on Mr. Christie, suffer shock? A. He could.

Q. And if he did, would it be probable that he would be nervous as a result of this experience, this injury? A. Not necessarily.

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CROSS EXAMINATION
BY MR. RICHARDSON:

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Q. With reference to the ulceration, is the type of ulcer which you make reference to the same as the duodenal ulcer? A. No, not directly, no.

Q. In other words, the type of ulcer you make reference to, is it the bleeding type like the duodenal? A. No. I am speaking specifically of the ulcer on the leg which was due to lack of circulation.

170 Q. That is what I mean. It is not the bleeding type, such as the duodenal, then, is it? A. It can be. It can bleed. It is a different, a mechanical type ulcer, however.

Q. Is it considered, within your knowledge, to be as dangerous a type of ulcer or as bad a type of ulcer as a duodenal? A. Not in general, no.

Q. Do you have a specific recollection of Mr. Christie's posture at the time of your first seeing him? A. Yes.

Q. (Continuing) -- on his feet? A. Well, when we first saw him on his feet after the injury.

Q. What would be your description of his posture at that time? A. Generally very much as it is today. There may be some accentuation, that is, in the upper back, but not a very great change.

Q. And could that not be a result of advancement in age? A. Yes, it could be.

Q. For a person of his age? A. It could be.

171 Q. Now, Doctor, I don't believe you have given your estimate as to the disability on the part of Mr. Christie. A. You mean percentage-wise?

Q. Yes, sir. A. No, I haven't.

Q. Would you be kind enough to give that, if you feel that you are in a position to give it? A. (No response)

Q. If you are not at this particular time, -- A. No, I don't --

Q. If you are not at this particular time, -- A. No.

Q. (Continuing) -- it is all right. All right, sir. Now, at the time of your first examination, did you observe anything, any difficulty, any physical difficulty with reference to any other part of Mr. Christie's body, other than his legs? A. No. He had no record. (Looking at records, as before)

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173 Q. Now, kyphosis; what is kyphosis? A. Kyphosis is a rounding of the back in this position. (Illustrating) In other words, an increase of the normal curve of the spine.

Q. And you did notice that at the time of your examination, your first examination, didn't you? A. Yes.

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174 Q. *** Now, you make reference to circulation. You, I think, stated that there was a deficiency in circulation. A. Yes, sir.

Q. Is that correct, sir? A. That is correct.

Q. Did you examine Mr. Christie at any time before this accident? A. Never had, no, sir.

Q. Then you wouldn't be in a position to state whether or not there was any circulatory deficiency before the accident, or would you? A. No. Let me make one point clear on that. I am speaking specifically of circulation in relation to these injuries and the formation of the ulcers. I am not talking about his general circulatory condition.

Q. I see. But nevertheless, you have no observations to make about his general circulatory condition prior to the accident, do you? A. No, I do not.

Q. I see, sir. Now, with reference to the legs. You have stated that one leg was larger than the other. Did you -- Well, we will cover

everything this way, Doctor: Had you examined Mr. Christie for anything or in any way prior to this accident? A. No, had not.

175 Q. So then, therefore, you can't say whether or not one leg was larger or smaller than the other, prior to the accident, can you?

A. No.

Q. Now, with reference to the injuries to his legs, what would be your observation with reference to this: Would walking be a greater strain upon him physically than standing? A. Walking would be a greater strain.

Q. Would be a greater strain? A. Yes.

Q. Now, as of what time, Doctor, within your recollection, would you say would have been the first time, the earliest date that Mr. Christie could have again, from a physical standpoint, resumed the occupation of a lecturer? A. A school teacher lecturer?

Q. Yes. A. I would say somewhere late in the fall of '54.

Q. Sometime late in the fall of '54? A. December; November, December.

Q. Thank you, sir. Now, further with reference to shock. Was Mr. Christie in a state of shock at the time you first examined him? and if so, to what extent? A. Very mild.

176 Q. Very mild. A. Yes.

Q. And when, if your visits permit you to make a statement on it, when would you say was the earliest time that he had recovered from that mild shock? A. That would be within the first day.

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REDIRECT EXAMINATION

BY MR. WALSH:

Q. Did you furnish me at my request with a report of your examination of Mr. Christie on December 16, 1954? A. Yes, sir.

Q. And did you state in that letter to me, in that report, rather, the very last sentence: (Reading)

"He probably will always have some disturbance from the extremity, due to the circulatory change."

A. Yes, sir.

Q. And has your examination of Mr. Christie, subsequent to that date, caused you to change your report with respect to that statement? A. No, sir.

Q. This most recent report which you furnished me at my request, dated November 19th, in the last paragraph, impression, with
177 particular reference to the wounds of both lower extremities, due to the crushing, I ask if this word "crushing" is the same as the explanation you gave with respect to pressure. A. Yes, sir.

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BY THE COURT:

Q. How large was this ulcer on the left leg when you saw it last?

A. When I saw it last?

Q. Yes. A. In November of 1956 there was just a very small ulceration, about the size of the end of, the eraser end of a lead pencil.

Q. Now, you stated that standing or walking would not be indicated. Did you mean by that that he should be immobilized? A. No, no. I meant by that, a occupation in which that was the principal duty, such as, well, a postman or a policeman, an occupation in which walking or standing was the principal activity.

178 Q. I see. You didn't mean that he shouldn't walk or stand?

A. Oh, no, sir.

Q. Now, you said you found no fractures on either leg. A. That is right.

Q. Did you find any damage to the bone structure? A. No damage.

Q. Did you find any damage to the ligaments? A. In the area in the front of the leg, the pressure, damage to all the soft tissues, but not to the supporting ligaments of the joints above or below the involved area.

Q. They weren't torn? A. No, sir.

Q. Or crushed? A. No, sir.

Q. Now, this diagnosis of lack of circulation in the area of the wounds, you came to that conclusion because of the fact that the wounds didn't heal as rapidly as you expected? A. Two ways: one, they did actually open while under treatment, and then did not heal. When we first saw them, there were more contusions, more bruises, but they actually just opened as the hemorrhagic situation became too much for
179 the leg; the skin was just broken off the top of the blister.

Q. You didn't determine it by any mechanical or laboratory test?

A. No, sir.

Q. Would a blood pressure machine show anything on this?

A. I don't think so.

Q. Did you take his blood pressure? A. His blood pressure was taken at the hospital.

Q. But you don't think that would have any significance so far as the circulation in the area involved is concerned? A. No, I don't think it would have any real bearing.

Q. That circulation would be localized? A. Local to the area, yes.

Q. And you didn't come to any conclusion as to arteriosclerosis?
A. None; not relevant to the injury itself, no.

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181

DR. JOHN C. SULLIVAN

was called as a witness and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WALSH:

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182 A. Mr. Richard B. Christie was first seen and examined by me
on the 19th of November, 1956, at my office. (Looking at records)
And, if I may refer to my notes, -- ?

* * * * *

183 MR. RICHARDSON: No objection, Doctor.

A. (Continuing) (Looking at notes) Mr. Christie, at the time I first saw him on the 19th of November 1956, gave a history of having a gnawing type of pain and distress in the upper abdominal area for the past six months, the pain appearing approximately two or three hours after meals, and relieved somewhat by eating, but having recurrence of a sensation of fullness and producing discomfort also after eating occasionally immediately. This train of symptoms, together with occasional pain and distress, occurring at one or two in the morning, together with occasional nausea and vomiting, has persisted almost constantly every day for the past six months.

He was hospitalized at the Winter Park Memorial Hospital, Winter Park, Florida, on the 19th of October 1956, and was under the care of a Dr. Ramsey at that time. He consulted Dr. Ramsey because he had noted very little relief of this pain and discomfort in the abdomen, and had noticed a progressive weakness and tiredness from the first week in October, together with the fact that he had developed a severe respiratory infection, necessitating his consulting with Dr. Ramsey. At that time that he first saw Dr. Ramsey and was hospitalized, laboratory and other examinations revealed that he was suffering from a rather severe anemia. The cause of the anemia was ultimately

184 determined to be due to an active duodenal ulcer which caused bleeding from the gastrointestinal tract, and the subsequent anemia.

THE COURT: This is all what he told you, Doctor?

THE WITNESS: Yes, that is correct.

A. (Continuing) During his stay in the hospital, he was given appropriate treatment for the duodenal ulcer, which was discovered,

as I mentioned before, by fluoroscopic and X-ray examination. In addition to this, he was given three whole blood transfusions, and he felt much better following the transfusions, and his abdominal symptoms which he had had for the past six months were abating.

He told me that he was discharged from the hospital on the 14th of November, five days prior to his seeing me, and he was given a type of program to follow, including medications, by Dr. Ramsey, together with a dietary regime.

On examination by me on the 19th of November 1956, the examination consisted of the following. There was a well healed scar in the right groin area, which was due to repair of a hernia several years ago in Kent, Ohio. There was tenderness on palpating in the right side of the mid-portion of the abdomen just below or beneath the right lower rib margin. There were no palpable organs or masses.

A plain or flat film of the abdominal area by X-ray revealed no significant abnormalities.

185 The next examination was the fluoroscopic and X-ray film examination of the upper portion of the gastrointestinal tract, which includes the esophagus, stomach, duodenum, and the upper part of the small intestine. The stomach was revealed to be normal in size, shape and position. There was a moderate spasm as seen under fluoroscopy of the pyloric or the outer, lower portion, outlet part of the stomach, and on fluoroscopy and on the film examinations there could be seen a small ulcer crater on the films located near the base of the duodenal cap, on the lesser curvature side. This was located at or near the same location that Dr. Ramsey had described in his notes to Mr. Christie.

That ulcer crater measured approximately one half centimeter in diameter, and during the fluoroscopic examination, there was again noted tenderness over this area. The stomach emptied out well. There was no evidence of obstruction.

The blood picture, on the 19th of November, revealed a hematocrit value of 38 per cent, which is just a few percentage points below normal.

The previous hematocrit value when he was admitted to the Winter Park hospital was 20 per cent, which indicated a rather severe degree of anemia, due to blood loss.

Mr. Christie further stated to me that he had lost approximately 20 pounds in the past five weeks.

186 My conclusions at that time were: Duodenal ulcer, active; no evidence of ulcer of the stomach or other abnormalities within the abdomen; and, three, no evidence of a previously healed ulcer of the duodenum which would have manifested itself by a residual deformity of the duodenal cap.

BY MR. WALSH:

Q. Doctor, what are the usual symptoms of this duodenal ulcer?

A. The usual symptoms are those related to usually mealtime activity. An individual with that type of an ulcer will have distress, pain or discomfort in the upper portion of the abdomen, occurring usually two to three hours after meals, when the stomach is usually empty, and is relieved somewhat by eating or taking anti-acids.

Q. Doctor, is this a painful sensation? A. Yes, it is a very uncomfortable, it is an annoying and a nuisance type of sensation. It makes an individual --

Q. When you say nuisance, -- A. (Continuing) -- uncomfortable.

Q. (Continuing) -- does this interfere with the normal activity of a person, normal everyday activity, his work? A. It can, yes. It can make them feel mighty uncomfortable, and it distracts them from their attention to their ordinary activities and daily work.

187 Q. Was the condition that Mr. Christie had, called sometimes a bleeding ulcer? A. That is correct. It is a duodenal ulcer with bleeding. That is a complication of an ulcer. That is one of the complications.

Q. So a duodenal ulcer may not be a bleeding ulcer? A. That is correct.

Q. And a bleeding ulcer is a further aggravation of the condition? A. It is a complication of a duodenal ulcer or a peptic ulcer of the stomach or duodenum.

Q. And how and why does such an ulcer develop to the condition of being a bleeding ulcer? A. Well, a bleeding occurs because the ulcer has eroded to a depth enough in the stomach or duodenum to permit the exposure of a blood vessel and erode right through it so that there is no protection for it, and it bleeds, similar to a real severe abrasion to the skin. If it takes the top layer of skin off, then we know that there is oozing and bleeding, and if it goes deep enough, of course, the bleeding can be severe.

Q. How long does this take to become a bleeding ulcer? A. That is difficult to say. If an ulcer goes untreated, it may occur rather abruptly after a few hours of having symptoms of this type of distress or discomfort, or it may occur after several months. In other words,
188 there is no cut and dried time.

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Q. What other symptoms would there be? A. Well, those of a bleeding ulcer would be those relative to the loss of blood over a period of time. If the bleeding is the oozing type, like, say for example a leaking faucet, the patient may not be aware of it, and the symptoms of blood lost may appear gradually: that is, progressive weakness, easy fatigue, no ambition, no desire to do anything except lie down and rest.

In an acute blood loss, of course, the manifestations then would
189 be those of shock. The patient would collapse, unable to arise; his skin would be cold, clammy, blood pressure low, pulse rapid, thready, and the patient would need immediate replacement of the blood lost there, because of the large volume lost in a rather short time, contrasted to a slow leaking type of affair.

Q. Another person then would observe that the patient was pale? He would be pale? A. Yes, if the blood loss has continued for, say, if it is a continuous loss of blood through the bowel, the individual himself may not be aware of it. It is often friends or relatives or someone to whom they are talking will say, "You look pretty pale."

Q. Does a hematocrit blood count of 20 per cent indicate severe anemia? A. Yes, quite severe.

Q. A great loss of blood? A. Yes.

Q. And would it be reasonable to expect that the treatment of that would involve as many as four blood transfusions? A. That is correct, roughly three, four; or, if the blood loss continues, it will, of course, require more.

Q. And would it require hospitalization? A. Yes, sir, correct.

190 Q. Is this in any way related to age? Would an older person require more extensive treatment or respond less rapidly or quickly? A. By and large, yes.

Q. Well, then, if a man sixty-five years of age, approximately, had this condition we have just described, 20 per cent hematocrit, and was hospitalized for it, would it be reasonable to remain in the hospital for such treatment about twenty-six days? A. Yes, that is average. From three to four weeks is the usual requirement for the management of this type of case, I would say.

Q. When you examined Mr. Christie on November 19th, you found that he still had the ulcer? A. That is correct.

Q. And that this ulcer was active? A. That is correct.

Q. Would you describe what you mean by active? A. Well, the ulcer appears on the fluoroscopic examination and also upon the film examination, appears as, the best way, probably, to describe it, if you have a, you dig a little hole, say about an eighth of an inch deep, and drop this barium material in it, it will appear on the films as a little round or oval shaped affair, containing the barium; and that is called a crater, and ulcer crater. And over this area, on fluoroscopic
191 examination, there was noted tenderness; and also it was noted when I first examined the abdomen, before the fluoroscopic examination.

Q. Does the word "active" indicate any activity, something that is dynamic or has a -- A. Yes. It indicates that there is still some activity insofar as the ulcer has not healed completely. In other words,

the lining of the stomach, just like the person who has an abrasion of the skin torn off, when that begins to heal there is a scab formed, and later the new skin forms underneath, and the scab is extruded, a similar process, basically, within the gastrointestinal tract, the lining tries to rebuild. And also there is, if the ulcer is deep enough, there will be scar tissue formed as you do when you get a real deep cut and the scar is formed.

Now, there was no evidence of this type of healing in this ulcer, no evidence of the disappearance of it from the previous description afforded us by Dr. Ramsey from Winter Park. It is still there. It was still there the 19th of November.

Q. Now, considering the parallel of the abrasion, an abrasion, of course, ordinarily would be caused by some force, some outward force, -- A. Yes, sir.

Q. (Continuing) -- some foreign force. What would cause this
192 type of abrasion in the interior of the body, the stomach or the duodenum? A. Well, for many years now, we have known that, and it has been quite well documented that there is a definite relationship between ulcer formation -- that is, I am referring to peptic ulcer formation of the stomach or duodenum -- and emotional tension: stress, strain, and that type of activity.

Q. Now, Doctor, from your experience and your observation and your examinations of Mr. Christie, and assuming that a man sixty-five, sixty-three, -four, and -five, running through that period of his life, experienced an automobile accident, as a result of which he suffered severe injuries to his legs, and he was thereby disabled from pursuing his profession, that of a college professor; and further, that he was unable to secure any employment, as a result of all of which, and the added fact that he had no independent income, he was reduced to financial circumstances that we can best describe as being stony broke, and having to worry about day to day living expenses, keeping body and soul together, and that this condition persisted month after month for well in excess of a year, without any amelioration or any immediate hope

of bettering the financial condition or paying the indebtedness which was incurred in living; would this result in the type of emotional stress and
 193 harassment and frustration which would be the cause of the condition that you have described, the duodenal bleeding ulcer? A. Yes, I would say so. It could certainly produce that type of picture, in the circumstances that you relate.

* * * * *

194 Q. In the condition which you observed on November 19th, of Mr. Christie, what treatment did you prescribe for him? A. I recommended that he continue with the medications that Dr. Ramsey had originally prescribed, and that it probably would be best if he were permitted to continue on a rest type of medical regime to permit complete and thorough healing of the ulcer, inasmuch as it still was present on the films.

Q. And diet? A. That is correct.

Q. So that, in short, to ameliorate his condition and to work toward an ultimate solution of it, he should have rest and a regulated diet? A. That is correct.

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CROSS EXAMINATION

BY MR. RICHARDSON:

195 Q. Dr. Sullivan, will you be kind enough to read to the Court and to the jury the first sentence under "Comment" on page 2 of your report of 19 November 1956? A. Yes, sir. (Reading:)

"Comment: Historically, there appears to be no causal relationship between the injuries sustained as a result of the accident which occurred in June 1954 and the occurrence of the duodenal ulcer with bleeding in October 1956."

Q. Will you be kind enough to explain to the Court and the jury what you meant by that sentence? A. By that, I mean two things: first, the occurrence of an ulcer as a result of a type of injuries that Mr. Christie incurred, they were not to the abdomen, it didn't receive a direct blow; secondly, there have been well documented cases of ulcer occur following direct blow to the abdomen. This however, was not the case in Mr. Christie's accident, in which he suffered injuries elsewhere; and based upon the history of the injury, which was not to the abdomen, but to the other portions of the body, which I believe have been explained, --

Q. Certainly, Doctor. A. (Continuing) -- that the ulcer due to direct injury to the abdomen would have occurred very shortly after the accident. However, Mr. Christie suffered the ulcer in October, 196 approximately October, but dating back six months prior to October, the symptoms began at that time.

Q. Well, then, am I correct in stating, then, that that sentence means that the injury which he received, which he says that he received from the automobile accident, which I tell you, and maybe you already know, was an injury to his legs, -- A. That is correct.

Q. Am I correct in saying, then, from reading that sentence, that this duodenal ulcer which he told you he had first symptoms of in October 1956, am I correct in saying that within your opinion, that that was not caused by the injury to his legs? A. That is correct. That is what is meant by that, that the injury to his legs didn't cause the ulcer.

Q. Yes, sir,. Thank you. Now, you did say to the judge, as I recall it, to His Honor, that the history which was given to you was given by Mr. Christie. A. That is correct.

Q. And so therefore, you have no firsthand knowledge of your own with reference to when, through examination or otherwise, he first had symptoms of a duodenal ulcer, do you? You got that from him, didn't you? A. That is correct, and from Dr. Ramsey's report.

198 Q. I am asking you whether or not the ulcer was bleeding at that time. Did you find out from your examination? A. He had an active ulcer.

Q. But was it bleeding at that time; do you know? A. You couldn't tell, but his hematocrit was not normal.

Q. You couldn't tell, his what? A. His hematocrit value was not normal.

Q. That is, the blood value? A. Yes.

199 Q. Was not normal at that time? A. Was just a few points below normal.

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200 Q. Now, then, you stated, as I recall it, that of course, blood transfusions can build up the blood value; they do. A. If the bleeding stops.

Q. That is right. And also the stopping of the bleeding can build up the blood value; isn't that correct? A. Well, the body has a normal mechanism by which it replaces lost blood cells, yes.

Q. And then, if there is a stopping of bleeding and the normal replenishment mechanism is operating properly, the body will take care of the building up? A. With a loss of approximately 50 per cent, though, it would be quite a strain and stress on the body, blood-building activity.

Q. But you didn't testify it was 50 per cent when you examined him. A. Well, it was obvious, from 38 or 40 per cent down to 20 per cent.

201 Q. Yes, but at the time you examined him there was a very slight blood deficiency; is that correct? A. That is correct.

Q. Now, then, Doctor, you have stated that emotional tension or emotional upset has been traced, in study of such cases, as a cause of this type of ulcer. A. That is correct.

Q. And of course, when you say emotional tension, and emotional upset, you mean anything within the realm of the activity of a human

being that might cause that emotional upset and emotional tension, don't you? A. That is correct. Worry, --

Q. That is correct. A. (Continuing) -- anxieties, tensions, reverses of any type.

Q. That is correct. A. (Continuing) -- conflicts.

Q. Now, going back to the history again, your statement, then, in your report, that a duodenal ulcer of this type can be caused, can be the result -- Well, suppose you read your report from "However" on, under "Comment." I didn't mean to chop you off on the first sentence. Read the rest of it, please, sir? A. (Reading) "However, during the course of the history taking, Mr. Christie related that since the time
202 of the accident, he has been quite burdened financially, since for most of the time since the accident he has been unable to carry on with the professional work for which he has been trained. This has resulted in an increasing degree of worry, stress and strain in his attempt to make ends meet.

"In this connection, it is believed that there is a definite relationship between the worry, stress and strain, and the development of an acute bleeding type of duodenal ulcer and the persistence of it as of today," 19 November 1956.

Q. Yes, sir. Did you inquire of Mr. Christie, at the time he gave you this history, of any other activities or phases of his life, or is this what he told you and all he told you as a basis of that opinion?

A. He mentioned during the course of the conversation in the office that he had been in the economic teaching profession.

Q. Well, I think that is all covered here. But I mean, did you make inquiry of him with reference to his life in general, other than these matters that he related to you? A. Not in general, no. I asked him how he was getting along, and he said he wasn't able to make ends meet, as I quoted here.

203 Q. So you did not ascertain through your conference whether or not there was anything beyond this that could have caused emotional stress and strain, did you? A. In relationship to the accident, you mean?

Q. With relationship to the ulcer. A. No. He had been symptom-free as far as his stomach is concerned or was concerned, insofar as his activities all during his life up until six months prior to the hospitalization.

Q. He had been symptom-free? A. Insofar as the stomach was concerned.

Q. And where did you get that information from? A. He told me that.

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REDIRECT EXAMINATION

BY MR. WALSH:

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204 Q. (Continuing) - that your explanation was, the use, the choice of words, of language, of the statement that --
(Reading:)

"Historically, there appears to be no causal relationship between the injuries sustained as a result of the accident which
205 occurred in June 1954 and the occurrence of the duodenal ulcer with bleeding in October 1956."

-- your explanation is that there was the one, the ulcer was not the result of the blows, the injuries received in the accident, the physical blows resulting in injuries to his legs was not the immediate cause of the interior abrasions in the stomach. A. That is correct,. Yes, that is what I mean to say in that first sentence, under "Comment," that a direct blow to the legs had no relationship to the causation of this ulcer.

Q. You did not mean to say, you did not mean by that that the ulcer and the cause of the ulcer was not related to emotional upset which was the result of these blows received in the accident mentioned?

A. That is correct. I didn't mean it that way.

Q. Now, Doctor, have you rendered a bill to Mr. Christie for your treatment? A. I don't know whether it has been received or not, recorded.

Q. How much is it? A. Fifty dollars.

Q. And has that or any part of it been paid? A. No, sir.

206 Q. Doctor, let me ask you a question with respect to charges for this type of treatment. Would it be necessary, during twenty-six days of hospitalization for a bleeding ulcer, would it be necessary to have X-rays? A. Yes, indeed.

Q. And would it be reasonable to have as many as nine in a period of twenty-six days? A. Are you referring to -- ?

Q. I am referring to hospitalization for twenty-six days for a bleeding ulcer. A. Yes, I would say so, to determine the cause of the bleeding, yes.

Q. Yes. And would a charge of \$90 for nine of them be reasonable and usual? A. Yes, that is reasonable.

Q. (Continuing) -- while in a hospital? And you have already testified that four blood transfusions during such a period would not be unusual. Would a charge of about \$80 for the four, including setups and blood, be unusual? -- would it be usual, rather? A. That is about the usual fee, throughout the country. Of course, if it is needed, it is given free and replaced later by the individual or his relatives.

Q. And as a consequence of this treatment, would there be any expenses incurred for laboratory and antibiotics? A. Yes, that is
207 standard procedure of doing repeated laboratory work to determine the blood status, from hour to hour or day to day.

Q. And during twenty-six days of hospitalization for a bleeding ulcer, would a charge of about \$33 for laboratory be usual? A. Yes, depending upon the number of blood tests that were done to determine the status of his blood to follow whether or not the bleeding had been stopped or not. That is the important point of doing those repeated blood examinations.

Q. And would a charge of approximately \$45 for antibiotics and drugs during a period of twenty-six days in the hospital be usual and reasonable? A. I would say that it is within the realm of reason.

Q. And for a general practitioner who treated a man for this condition and called on him in a hospital every day --

MR. RICHARDSON: Your Honor, I object to these questions. This witness has no knowledge whatsoever as to what treatment --

THE COURT: I sustain the objection.

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RECROSS EXAMINATION

BY MR. RICHARDSON:

Q. And now that we are talking about charges, Doctor, what personal knowledge do you have of what is and what is not a reasonable charge in the State of Florida, with reference to laboratory fees, blood transfusions, antibiotics, and the like? Do you have any personal knowledge of what is and what is not a reasonable fee down there?

A. Yes, sir.

Q. And how? A. I happened to be down there a while ago.

Q. You happened to be down there? A. Yes, to a meeting, and talking with some colleagues there in that area.

Q. And you found that from talking with colleagues? A. Yes.

Q. Did you go to the hospitals and inquire? A. I have been in several meetings and inquired.

Q. Did you then -- A. You mean the day he was in the hospital?

Q. No; I mean the time you say you got this information.

209

A. Well, that is where the meeting was, in the hospital.

Q. And did you get firsthand knowledge or from others as to what the cost of laboratory fees, blood transfusions -- A. What do you mean, firsthand knowledge? Ask the patient what he paid?

Q. No; go to the hospital and ask the hospital. A. That is where the meeting was.

Q. I know the meeting was at the hospital, Doctor. A. Well, I was in the hospital.

Q. All I am asking you, did you ask the proper person in the hospital, that assesses the charges for laboratory fees, what the laboratory fees are that Mr. Walsh has referred to, that type of laboratory fees? A. I saw a copy of one, of another patient, that was showed to me.

Q. Rendered by that particular hospital? A. No, not that particular one, no, but one in Florida.

Q. Where in Florida? A. In Miami.

Q. Well, can you testify that the charge in Miami was the same as where you were? A. No; I said it might be similar.

210 Q. Now, Doctor, you state that an accident such as Mr. Christie told you he suffered, and a lifetime experience such as Mr. Christie told you he experienced, in your opinion could cause this duodenal ulcer; correct? You just told Mr. Walsh that. A. Accident?

Q. Yes. Mr. Walsh further questioned you, because of my questioning of you, wherein you stated to my question that the accident in and of itself, in accordance with your report, was not the causal, did not cause this ulcer.

THE COURT: Now, he had an adverb in there; "historically." Then he described what he meant by this.

MR. RICHARDSON: Historically.

BY MR. RICHARDSON:

Q. And now you say that historically, or do you say historically now -- I presume you would have to say historically, because it is all from history, -- A. That is right.

Q. (Continuing) -- that the accident, plus the life experience that Mr. Christie reported to you, in your opinion caused this ulcer. Is that correct? A. I believe it is pretty well explained in this comment.

Q. Well, I thought it was, too.

THE COURT: Answer the question, Doctor, if you can.

211

THE WITNESS: In what way, Your Honor?

THE COURT: He just asked a question. Just say yes or no, or explain it. This is cross examination. A. This is the accident itself?

BY MR. RICHARDSON:

Q. Yes. A. There was no direct blow to the abdomen.

Q. That is correct. A. It did not, in my opinion, cause the ulcer.

Q. Thank you, sir. That is what I thought you said. In other words, you said, as I recall, that it was related to you historically from Mr. Christie as to the aftermath, his difficulty in getting employment and all that, which in your opinion caused the ulcer; the worry, the stress and the strain. Isn't that correct? A. That is correct.

Q. That is correct. Well, isn't it a fact, Doctor, that you not having observed this gentleman, he not even having been in the same town, you not having treated him at all, that this ulcer could have been caused by some other emotional strain, if he had some other emotional strain? A. Well, my point here is that emotional strain of any type, --

Q. Q. Any type. A. I don't specify any one particular --

212

Q. In other words, you are not excluding any other emotional strain that might have occurred? A. No. I say in the next to the last sentence that as a result of an increasing degree of worry, stress and strain, and I believe that there is a definite relationship between worry, stress and strain, and the development of an ulcer.

Q. But there could be other emotional stress and strain which you knew nothing about, couldn't there? A. I didn't specify what the exact type of strain or stress or burdens were.

Q. Thank you.

MR. WALSH: That is all, Your Honor.

BY THE COURT:

Q. Doctor, you then attribute the ulcer to anxiety and concern and emotional upset? A. That is correct, Your Honor.

Q. You don't know what caused it? A. No, sir.

Q. But you inferred it was caused by financial worry? A. Could be. I believe --

Q. Well, did you infer that? A. That was one of the inferences in it, in Mr. Christie's history.

213 Q. Now, if that financial worry was removed, would that be good therapy for the difficulty? A. Well, I think certainly any type of security, Your Honor, is a big boon toward helping anyone get better.

Q. And you think that if the removal of the financial worry took place, that would be curative? A. I can't say curative, Your Honor. I would say it would help the man to improve.

Q. I think you said you prescribed continued rest, and medication, which would relieve the tensions. A. Well, that will help, too, but I don't --

Q. Well, I don't see how a man can rest and have his tensions relieved when they are caused by financial worries which cannot be relieved if he rests. Will you explain that to me? A. Removal of an individual from his surroundings of tensions and anxiety is one of the big features in the management of ulcer; and certainly, anyone who has had an acute ulcer and removed from his surroundings, even though he has to return to them at a later date, has effected a healing of the ulcer -- not using the word "curative."

Q. Well, wouldn't you recommend that he do something to relieve his financial worry? A. That would definitely help, I imagine, Your Honor, but there are things that are controllable and probably

214 things that are uncontrollable in the management of ulcer, and we try to exercise as much control over the controllable factors as possible in the management of ulcer, to offset the uncontrollable ones, which may be just temporary, or they may even be of a permanent nature.

Q. You understood this man had no money except what he earned, didn't you? A. That is correct.

Q. Well, do I understand, then, that you think that a relief from financial worries would be beneficial to him? A. If he can obtain

gainful employment, that would be a big factor in enabling him to resume activity after the ulcer has healed.

Q. Well, how can he obtain gainful employment, and rest as you say? or do you think the rest was only temporary? A. Temporary.

Q. Oh, I see. A. Until the ulcer healed, sir.

Q. Oh, I see. A. That is correct. Then, if he were assured gainful occupation, --

Q. It wouldn't recur? A. I believe so.

Q. I see. Did he tell you that he had been employed from about the first of the year until just before he went into the hospital in October,
215 and in gainful employment of about fifty dollars, the average of fifty dollars a week? A. I didn't ask him about that, Your Honor.

Q. Would that make any difference in your opinion? A. Well, if he were, if he felt secure in that position, I think that that would maybe make a difference.

Q. What would the difference be? A. Well, it would probably mean that there might have been other factors at work in production of the ulcer in connection with stress and strain, not only financial difficulties.

* * * * *

THE COURT: Well, how long would this period of rest require, in your opinion, before he could go back?

DR. SULLIVAN: I would recommend a minimum of three weeks, Your Honor.

* * * * *

216

DR. EVERETT J. GORDON

was called as a witness and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION
BY MR. RICHARDSON:

* * * * *

219 A. *** On examination at that time, it was noted that he walked with a halting type of gait with a very stooped posture, which he had stated had been present for many years; that is, he was bent over in sort of a hunched position. He had a marked kyphosis deformity, --

* * * * *

220 A. *** Examination of his legs showed a small ulcer on the left leg, which was one and a half by one and a half inches in size, surrounded by red and purplish skin, soft tissue. He had numerous superficial varicose veins of both feet and both legs -- that is, bilateral -- and with a brownish mottling of both legs below the knees. That is, the skin was discolored, the typical finding of what we call venous status, which means the impeded circulation, where it had been present for many years, probably, due to varicose veins, not proper circulation. This was the same on both sides.

He had some thickening of the right ankle, but this was probably due to an old fracture that is not related to the present injury.

He also had numerous rales, or, his breath sounds were irregular; they were not clear. This was due to an old bronchiectasis, which is a bronchial condition, which he stated had been present for some time, where the cough would bring up sputum constantly.

X-rays were made, and the X-rays of his left leg and ankle were entirely negative, as they had been on admission to the hospital. X-rays of his spine showed the severe kyphosis, or round back deformity, with hypertrophic changes; that is, changes of degeneration which follow when the bones are in a deformed position for a long time. He also had

221 marked hypertrophic changes, or arthritis, in his cervical spine, and the fifth cervical vertebra was displaced forward on the sixth.

* * * * *

222 A. *** Now, based on this examination and the review of the records at Georgetown Hospital, I came to the following diagnoses: contusions of both lower extremities, with an ulcer, chronic, moderate, of the left leg; secondary trauma, superimposed upon circulatory insufficiency.

* * * * *

Q. But did the X-rays disclose any fractures? A. No, they did not.

Q. Did they disclose any injury to the bone? A. No.

* * * * *

A. ***And then, other diagnoses, which are many, were: benign prostatic hypertrophy; that is, an enlarged prostate gland, which is quite common in older people. And chronic bronchiectasis, which is his chest condition, Hypertension, or high blood pressure, due to arteriosclerosis, or hardening of the arteries. Severe hypertrophic arthritis, with sub-luxation -- that is, partial dislocation -- of the cervical spine, old.

* * * * *

223 A. ***From that examination, I felt that the injuries which he sustained directly from the accident of 1954 were those of his legs, and the right leg at that time had healed and he was having difficulty only with his left leg at that time. I felt that the chronic ulceration of

the left leg had persisted because of the poor circulation. At that time, I felt that he did have a partial disability of the left leg as a result of the chronic ulceration, but inasmuch as he was a professor or teacher, not a laborer, I felt that it would be insufficient to interfere with his type of occupation.

And it is obvious that a great deal of his difficulties stemmed from pre-existing deformities of the upper back and neck, with rather advanced degenerative changes due to his age.

* * * * *

224 A. Well, I felt that the ulcerous leg was definitely due to the accident. I felt that although he did have insufficient circulation in both legs, that there had been at least some temporary aggravation of that insufficiency in the left leg, from the accident, probably due to soft tissues swelling about the injured area, which interfered with the return of blood through the veins.

All the other things, there is no medical basis where they could be attributed to such an accident.

* * * * *

226 Q. Dr. Gordon, going further now, your second examination, as I recall it, was November 19th, 1956. Would you give the same information with reference to that examination? A. Well, at this time the patient was obviously improved. An examination of his left leg showed no drainage from the previous ulcerated area. It was covered with a scaly type of skin, and I flecked a few of the scales off, and there was no drainage underneath it; there was no open area that I could see. The patient stated that it had been healed for a short time. There was indurated tissue around it; that is, the tissue around the previously ulcerated area was thickened, which would be expected after having been present for a long time, as in this case.

He was not wearing any elastic stockings as he did previously, and he told me that he had not been wearing them recently, as I recall. This would indicate an improvement in the circulation of the legs, as the stockings were required for the poor circulation of the legs, due to the venous condition.

The examination of his back and his neck showed it to be similar to that previously noted. The patient thought that he was getting more round-shouldered and stooping over more. I couldn't disclose that by my examination. Of course, as people do get older -- and this is a
 227 condition found frequently in older people -- we do know that they do gradually get bent over more and more. We all see that about us, in friends and relatives.

Now, I couldn't see any difference, looking at him on the two occasions. Perhaps there was a little. I wouldn't be able to say. In any event, it had nothing to do with the accident. That is quite obvious.

Now, I also X-rayed his knees at this time, because he said he was having some aching in the left leg, and I thought perhaps he might have some arthritis in the left knee; but there was nothing on the X-rays. The X-rays were completely negative, of the knees.

From the examination, I felt that the patient had improved, that the ulcerated area had healed, and that the circulation had improved. The other conditions, which are, I believe, unrelated to the accident, are apparently status quo.

Q. And in your opinion as at the time of the last examination, would you have recommended further treatment for the left leg, the ulcer type -- A. Well, the ulcer was healed when I examined it, and certainly there is no reason to treat a healed area.

* * * * *

270

HELEN TERESA MacDONALD

was called as a witness and, having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WALSH:

* * * * *

271 Q. Will you tell the Court and jury how you came to meet him and know him? A. I was introduced to Mr. Christie by my husband. My husband met Mr. Christie in the lobby of the building shortly after he returned from the hospital. He was on crutches and was having great pain and difficulty getting around. One morning, Bill noticed he was in the lobby and asked him if he could give him a lift, and took Mr. Christie downtown or to his doctor. Shortly after that, I was introduced to him.

272 Q. When you say in the building, Mr. Christie lived in the same building with you? A. Yes, indeed.

Q. Thereafter, did you have any further opportunity to see him? A. Yes. We checked with him every few days to see how he was feeling, and Bill offered to drive him any time he could. About six months later, Mr. Christie came to our apartment one evening. He was very much upset. He was in pain, his leg was still giving him pain, --

THE COURT: This looks like a physician. (Indicating man who had entered courtroom)

Go ahead. We are just excluding a witness.

A. (continuing) He was still in a great deal of pain, and he was also very much distressed about his financial situation at the time. He told us that he was in arrears with his rent, and frankly admitted that he just didn't have enough money to buy his meals the next day. So he asked us if we could loan him money to pay up his rent and for his food. We felt that since we were both working, we could not help him with the rent, but we would be glad to advance him some money every week for his meals, which we did, over a period of weeks.

273 Q. You advanced him something each week? A. Yes, for a period of five or six weeks.

Q. And what was the total? A. It was something like a hundred; it was about a hundred dollars, just a hundred dollars, as I recall.

Q. Has any of that been repaid? A. No, sir.

Q. Did you have any opportunities, in observing Mr. Christie in your apartment, to state whether he had difficulty in walking? A. Yes. The evening he came in, his leg was, he told us that his leg was still bothering him. As I recall, he pulled up his trouser leg and showed me the bandage, and from the looks of the bandage, you could see still it was draining. I also recall he told us at that time that he was still going to the doctor at least once a week for a fresh dressing. He stated it gave him considerable pain at night and it bled a great deal.

* * * * *

CROSS EXAMINATION

BY MR. RICHARDSON:

* * * * *

275 Q. Did you have occasion to see, be in the company of Mr. Christie frequently, or how frequently, from the time you first met him? A. From the time we first met him, we saw him on the average of, oh, I would say three times a week. And if we did not see him, we would always check with the girl at the desk or call his hotel room to check with him to see how he was feeling.

Q. You took that interest in Mr. Christie? A. Yes, we did, because he was all alone.

Q. Did you carry him around in your car? A. Yes, my husband did, numerous times.

Q. Numerous times? A. Yes.

* * * * *

290

JOHN EDWARD BENTLEY

was called as a witness and, having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION**BY MR. WALSH:**

* * * * *

291 Q. In your position at American University as a dean, did you have occasion to interview applicants for teaching jobs? A. Oh, yes. I did all of that for the college.

Q. You did all of that for the college. And did you receive --
A. During the active deanship. That was from 1945 till '51 or '52; I have forgotten what date.

* * * * *

295 Q. Do you know the plaintiff, Richard B. Christie? A. Oh, yes, I know him quite well, because I think he came during the last year of my deanship, with his difficulties.

Q. Do you know if, while he was at American University during your time there, he actively sought a job as a teacher elsewhere?
A. Yes, I do, because he came to my office several times for information and help.

Q. Do you know when he began to make those efforts? A. No, I have no idea when those applications -- I never kept them in my mind, because these are relatively frequent.

Q. In the course of his discussing this with you, did he ever tell you that he had some prospects? A. Yes. He wrote to, I think it was somewhere in Texas, I believe it was the University of Texas, and I believe that was at the time when he had sustained this injury.

* * * * *

298

BY MR. WALSH:

Q. Doctor, so far as American University is concerned, would an applicant who was hospitalized to such an extent that he could not write letters for two weeks following June 8th prejudice him in, or impair his chances of obtaining a position as a teacher? A. Yes, if --

MR. RICHARDSON: Just a moment, Doctor.

BY MR. WALSH:

Q. -- as a college teacher?

MR. RICHARDSON: With what?

MR. WALSH: At American University.

MR. RICHARDSON: This man is from American University.

299

THE COURT: He said at American University.

MR. WALSH: I stated that. Sorry.

A. If I received such a letter, say, early in June, and then nothing occurred and we were in dire need of filling a position, and nothing came for two to three weeks, I should take it for granted that the individual had been located somewhere. So he would be prejudiced --

THE COURT: You mean if you had written a letter? Is that what you mean?

THE WITNESS: No; if anyone had written one to me.

THE COURT: And you said if nothing came?

THE WITNESS: And then nothing later was sent.

THE COURT: Then, you expect a follow-up?

THE WITNESS: Probably so.

THE COURT: All right. All right.

BY MR. WALSH:

Q. Now, is it usual -- and still referring to American University -- is it usual practice for an applicant, as the time for filling the faculty for the ensuing year grows short, is it usual for the applicant to follow it up actively? A. It is not -- I can't answer that question, because it all depends on the individual. He might and he might not.

The individual, if he had word, he perhaps would not write and say that he had been appointed to a certain position elsewhere. If he had not, he might write a letter indicating that nothing had occurred, and he would
300 like to know just the status of his letter and the condition that he understood was prevailing at the University.

* * * * *

BY MR. WALSH:

Q. Well, 1954, we are speaking of, the two weeks following June 8th. Is that a vital time for seeking a position? A. An individual might feel that late June is getting toward the danger line; and it is vital.

Q. And it would be necessary, then, to make active efforts?

301 A. Yes, precisely. I should expect an individual who was really in need to write another note at that time.

* * * * *

427 MR. RICHARDSON: ***Well, now, I want to request that counsel for plaintiff be not permitted to use the blackboard, with reference to any figures he has pertaining to damages.

THE COURT: Oh, I won't stop him if he wants to use it to add up. But of course, as soon as he gets through, you can erase it, and that will be the end of it.

MR. RICHARDSON: Then, I further request that he be permitted to use the blackboard for figures only to the extent of the figures in evidence.

THE COURT: Oh, certainly.

MR. RICHARDSON: And nothing beyond that.

THE COURT: He can't draw on his imagination.

MR. RICHARDSON: Thank you.

THE COURT: All right.

MR. WALSH: Thank you. I may not draw on my imagination on the blackboard, he means. I may draw on it otherwise? (laughing) Thank you, Your Honor.

428 MR. RICHARDSON: Thank you.

THE COURT: You can't draw on your imagination either way.

* * * * *

ARGUMENT ON BEHALF OF THE PLAINTIFF

440 MR. WALSH: ***All right. Well, how much of this pain and suffering was involved? 21, 22 days in the hospital on his back. A month and a half on crutches. And on a cane. And some time after that, unable to move around except by taxi and the help of friends giving him rides. That is testified to by Mrs. MacDonald, the neighbor.

* * * * *

441 But he was on his back, and he certainly lost earnings then, whether it was summer school at American University, which had not yet been determined, because the registration had not been totaled, or a job up in Maine, a summer job, of which there were plenty of summer jobs every summer. He gave the value of that as a thousand dollars. Well, certainly he lost that.

* * * * *

442 So great was his need that he fell behind on his rent, and the
443 landlord threw him out on the street. It is called filing a suit for possession in the landlord and tenant branch of the Municipal Court. But he was tossed out on his ear.

* * * * *

444 Now, it has been proved -- and this has all been testified. (at blackboard) Georgetown Hospital, 420. (Writing on board) Orthopedic surgeon, Dr. Rush, 325. Taxis after he got off his crutches to be transported, 140. \$80 for the suit that was ruined when the truck went over him. \$35 for the reading glasses which were thrown and scratched and unusable. \$1,000, very clear.

The summer job, the work he couldn't do when he was on his back or on crutches, \$1,000. \$2,000. All testified to.

MR. RICHARDSON: If Your Honor please, I object to this item, in view of the fact that there is no testimony whatsoever as to how much Professor Christie would have made, had he gotten this summer school job.

THE COURT: I think he said it would be a thousand dollars.

445 MR. RICHARDSON: He did? Then I beg your pardon.

THE COURT: That is my recollection; but the jury will recall.

MR. RICHARDSON: That wasn't my recollection.

MR. WALSH: Now. He did not get the teaching job for the ensuing academic year of 1954-5. \$4500. (Continuing to write on board)

THE COURT: I thought he said he made \$3400.

MR. RICHARDSON (Simultaneous with Court): I don't recall that, if Your Honor please.

MR. WALSH: \$3400, if Your Honor please, plus summer school, which he testified is the usual thing, that if you get the nine months' job, you get the summer school.

THE COURT: Very well.

MR. RICHARDSON: Well, what university was this?

THE COURT: You may argue that point?

MR. WALSH: Not on my time, please, Mr. Richardson.

THE COURT: You may argue.

MR. WALSH: Now we have got \$6500.

Now, he found himself down in the Winter Park Hospital with a bleeding ulcer. 578. The doctor down there, 177. (Writing on board as before) The ulcer doctor here. (Writing 50 on board) \$805. (Writing \$7305 on board)

All right, now. As a result of all this, certainly it has been shown that from that time, his earning capacity has certainly been
446 impaired. He has been making, as he has testified, approximately \$2500. Had he been able to work in his usual capacity, \$4500. So that for the last year, he has lost \$2000, the difference between \$2500 and \$4500.

Now, that is 9300.

What about the future? There has been testimony by Dr. Sullivan and Dr. Rush that he won't be able to do the type of work for the future. Well, he is 65. A man of his education and his training should certainly be able to earn \$4500 a year until he is 70. That's five years, at a difference of \$2000. So we will take the 9300 and we will add five years at \$2000 a year: 29,300. (Sic)

Now, pain and suffering, -- I had to drop the crayon.

THE COURT: Your 40 minutes have now expired. If you want to save 10 minutes for rebuttal, this is the time to do it.

MR. WALSH: Well, I suggested to Mrs. Burroughs that it was a minute I had. We put it at 12:29.

THE COURT: All right.

MR. WALSH: Just one minute.

I just wanted to point out that pain and suffering, I am not putting pain and suffering down there. How much? 21 days in the hospital. How much a day for the days in the hospital, at Georgetown? How much on the crutches and on the cane? How much, walking in the streets to the doctors? How much, all those months before going to
447 Florida? How much for the ulcer? How much for the days in the hospital with the bleeding ulcer, when he had blood transfusions? That is pain and suffering. He is entitled to be compensated for it.

But who can say what the value is? That is, who can testify to the value? Who can give evidence? Nobody. You have got to give a value to it. Because he is entitled to be compensated for all the items that have been enumerated here -- because, of course, you are free to give your own values to them. But all those items, all those elements, plus pain and suffering, from June 8th to today; and for the future, for the future, so long as injuries which caused pain and suffering, and which have been the result of this accident, persist.

Thank you, ladies and gentlemen.

Thank you, Your Honor.

MR. RICHARDSON: Mr. Walsh, take a minute of my time and correct this computation here, if you will. I don't think that is 29,000.

MR. WALSH: Oh, I'm sorry. (Correcting figure on board from 29,300 to 19,300)

MR. RICHARDSON: Thank you.

* * * * *

448 REBUTTAL ARGUMENT ON BEHALF OF THE PLAINTIFF

* * * * *

452 MR. WALSH: (At board, as before) His pain and suffering, dollars and cents, question mark (writing), pain and suffering to be added to all the other things which have been proved; and of course, the value of which you are free and you have the duty to determine.

* * * * *

231 JURY CHARGE

THE COURT: ***Now, you have a duty, separate and apart from the judge's duty, and that is to find the facts; and after you

have found the facts, you are to apply the law as I give it to you to those facts and reach a proper verdict. You are the fact-finding body. In finding the facts, you become the judges of the facts. You are the sole judges of the facts.

Now, how will you determine those facts? You will determine them on one basis alone: the evidence and inferences reasonably deducible from the evidence. The evidence consists of what you have heard from the lips of witnesses who have appeared before you, and the exhibits which have been received in evidence, and nothing else. You are not to guess or speculate, either as to liability or as to damages, but will limit your determination of the facts to the evidence and inferences reasonably deducible from the evidence.

* * * * *

232 Now, when I tell you that you are limited to the evidence in determining the facts, that does not mean that you cannot use your common sense or your experiences in life. You should use your common sense and your experiences in life when you weigh and evaluate and sift the testimony which you have heard.

* * * * *

233 In performing your task and in approaching your task, you must be fair and impartial and not allow sympathy or prejudice or emotion of any kind to influence or enter into your thinking or into your determination of the facts.

* * * * *

You should give close attention to the summations of counsel, because they are designed to assist you in organizing the facts in your minds. But you should remember that what each has said is said as an

advocate, and you should consider the summations in the light of their advocacy. You should also bear in mind that what counsel have said to you is not evidence, and if your recollection differs from theirs, it is your recollection that governs, and not theirs.

* * * * *

245 Now, if you find for the plaintiff, then you will come to the
246 question of damages. The plaintiff claims, in addition to the injuries immediately referable to the accident, that is, the injuries to his legs, further injuries, including a duodenal ulcer induced by nervousness and tension growing out of his physical injuries and concern over his financial condition, proximately resulting from the accident. Defendants claim that the duodenal ulcer is not referable to the accident, but is due to other causes having no relationship to it.

Plaintiff also claims that he has been deprived of earnings because of his incapacity to work as a college professor, and impairment of earning power because of his inability in the past and in the future to work as a college professor; but defendants claim that such impairment as he suffered would not have interfered with his employment as a college professor, and that he has not shown that he was able to obtain employment as a college professor, under the evidence.

On the question of damages, then, you will award to the plaintiff a sum which will fairly and reasonably and adequately compensate him for the damages proximately resulting from the accident, including the reasonable value, not exceeding the charge to the plaintiff, of the examinations, attention and care by physicians and surgeons, reasonably required and actually given in the treatment of plaintiff, and reasonably
247 certain to be required and given in the future, if any, including in such care, X-ray pictures and laboratory tests reasonably necessary; the reasonable value, not exceeding the cost to the plaintiff, of hospital accommodations and care reasonably required and actually given in the treatment of plaintiff, and reasonably certain to be required and given

in the future; the reasonable value of the time lost by plaintiff since his injury wherein he was unable to pursue his occupation, in determining which you should consider the evidence of his earning capacity, his earnings, and the manner in which he ordinarily occupied his time before the injury and after the injury, and find out what he was reasonably certain to have earned in the time lost, had he not been disabled, and any loss of earning power occasioned by his injury, and from which he is reasonably certain to suffer in the future, considering his health, physical ability, and earning power before the accident and what it is now, so far as it has been reduced by the injuries sustained on June 8, 1954.

You will also consider the nature and extent of his injuries, whether or not they are reasonably certain to be permanent or, if not permanent, the extent of their duration -- all to the end of determining fairly and reasonably the effect of his injuries upon his future earning capacity and the present value of the loss suffered, and such sum as will reasonably compensate him for the pain, discomfort and mental
 248 anguish suffered by him, and which he is reasonably likely to suffer in the future which, as I have stated, you find proximately resulted from the injury in question.

* * * * *

249 (At 6:00 p.m., the jury returned to the courtroom and the following proceedings were had:)

THE COURT: Who is the foreman?

THE JURY FOREMAN: I am. (Rising to his feet)

THE COURT: Mr. Foreman, not having heard from you, I assume that the jury has not as yet agreed upon a verdict.

THE JURY FOREMAN: We have agreed on the liability but not on the amount.

THE COURT: Well, it is now six o'clock, and I assume that -- or rather, I suppose that some of you have engagements for the

evening. Be seated, sir. Under those circumstances, I am going to allow you to separate and then return tomorrow morning at ten o'clock and resume your deliberations -- that is, unless you think there is likelihood, Mr. Foreman, of reaching an agreement within a reasonably short time. Do you think there is such a likelihood? Don't state anything except yes or no.

THE JURY FOREMAN: There is a possibility.

THE COURT: Well, do you think that another half hour might be desirable before I release you for the night?

THE JURY FOREMAN: I think it is worth trying, yes.

THE COURT: Very well, I will let you deliberate a little further until, say, six-thirty, and then if you don't reach an agreement, I shall take appropriate steps in the matter.

250 I don't want anyone to give up his views at all because of the time limitation. This case is entitled to your full, fair and complete consideration, even though it has to go over until tomorrow.

(Whereupon, the jury retired once more, to resume its deliberations in the jury room.)

THE COURT: Well, I will see you at six-thirty.

MR. RICHARDSON: I beg your pardon?

THE COURT: I will see you at six-thirty. If they don't reach agreement by then, I am going to send them home for the night and let them come back tomorrow morning.

MR. RICHARDSON: I think they will reach an agreement.

THE COURT: Well, we shall see what we shall see.

(Whereupon, the Court recessed once more, to await the verdict of the jury.)

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

*United States Court of Appeals
For the
District of Columbia Circuit*

FILED

JUN 11 1957

No. 13,756

Joseph W. Stewart

CLERK

ROBERT E. HAYCOCK, JR., AND
STANDARD FLOORS, INC.,

Appellants

v.

RICHARD B. CHRISTIE,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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(i)

STATEMENT OF QUESTIONS PRESENTED

1. Whether the trial court abused its discretion in denying appellant's motion for a new trial on the grounds that the verdict was excessive and contrary to the evidence where the jury was charged properly and where there was evidence which, viewed most favorably to appellee, provided substantial basis for the denial.

2. Whether the trial court abused its discretion in denying appellant's motion for a new trial upon condition that appellee file a remittitur where the trial court did not find that the verdict of the jury was based on passion or prejudice.

3. Whether the trial court abused its discretion in denying appellant's motion for a new trial on the ground that appellee's counsel wrote figures on the blackboard during his argument to the jury where said counsel made proper references to the testimony and evidence and to the conclusions and inferences fairly deducible therefrom.

4. Whether the trial court abused its discretion in denying appellant's motion for a new trial on the ground that the trial court had mishandled the jury where counsel for appellant had not objected to the trial court's offering the jury the opportunity to deliberate an additional half hour if they desired and the jury accepted the offer.

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA
CIRCUIT

No. 13,756

ROBERT E. HAYCOCK, JR., and
STANDARD FLOORS, INC.,

Appellants

v.

RICHARD B. CHRISTIE,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellee, while walking on the sidewalk of Wisconsin Avenue, Northwest, Washington, D. C., about noon on Monday, June 8, 1954, was knocked down and run over by a large truck driven by appellant Haycock and owned by defendant Standard Floors, Inc., which emerged from a private driveway. Appellee saw the front wheel of the truck go over both of his legs but he did not lose consciousness. (jt. app. 15)

The driver stopped the truck, told appellee, "I didn't see you" (jt. app. 16) and "It felt like I was going over a barrel." (jt. app. 17) The driver helped appellee, whose both legs were bleeding rapidly, into the cab of the truck. (jt. app. 16) and carried him to Georgetown Hospital. (jt. App. 18) There, appellee was helped by an orderly and a nurse into the emergency room where he was put on a stretcher. (jt. app. 18) He was immediately put to bed and remained in the hospital for about a month. (jt. app. 18) During his stay he was treated by Dr. Robert C. Rush at least once each day. (Jt. app. 18) Towards the end of his stay he was helped by an orderly into a wheelchair. (jt. app. 19).

Upon his discharge from the hospital he returned on crutches to his apartment where he lived alone. (jt. app. 19) He was treated actively by Dr. Rush until the following April, nine months later. (jt. app. 19, 46) For one and one-half months he had to use taxis for transportation, including going to his daily meals. (jt. app. 20) Then he was able to get around by himself, but slowly; and at street crossings with the aid of other pedestrians. (jt. app. 21) Dr. Rush had found that the "crushing" (jt. app. 52) of both legs had caused damage to all the soft tissue, resulting in wounds to both legs and a large hemorrhagic blister on the left leg which had to be opened and treated. (jt. app. 44) The wounds were treated regularly until April 1, 1955. (jt. app. 44) These open wounds are the type most frequently painful. (jt. app. 46) At this time, April 1, 1955, the wounds of the right leg were doing quite well but there was still considerable opening in the wound of the left leg. (jt. app. 44) Appellee was below normal activity. (jt. app. 46) His pain in walking was caused by movement of tissues in the open wounds. (jt. app. 47)

Dr. Rush did not examine appellee again until November 19, 1956, when he found that there was still a small weeping area on the wound on the left leg. (jt. app. 44) There was a diminution of circulation to the skin over the wound and the lower left leg was smaller in circumference

than the right leg. (jt. app. 45) The skin on the right leg was still discolored. (jt. app. 45) Appellee still had some disability of the left leg and would continue to suffer from weakness in both legs due to circulatory damage. (jt. app. 45) The extensive damage to soft tissue had caused this condition to persist for two and one-half years. (jt. app. 45) The open ulcer on the left leg caused pain due to exposure of nerve endings on the open wound. (jt. app. 47) There was permanent circulatory damage to the lower extremities. (jt. app. 47) Dr. Rush was not in a position to give an estimate, percentagewise, of appellee's disability (jt. app. 49) but said that appellee would be impaired in an occupation which would require him to be on his feet considerably - that standing or walking would not be indicated in his case (jt. app. 48) - "he probably will always have some disturbance from the extremity, due to the circulatory change." (jt. app. 52)

Appellee was graduated from Yale University in 1914 and taught mathematics and English for three years in Portland Academy, Portland, Oregon. (jt. app. 12) After two years in the Navy he spent about twenty-five years in the advertising field in New York City. (jt. app. 13) His last job there was with the Guaranty Trust Company at \$7,000 per year and bonus. (jt. app. 13) He left business to become Professor of Advertising at Kent University in Ohio. (jt. app. 14) After eight years at Kent he left in 1953 to teach at American University in Washington, D. C. (jt. app. 14) His salary at Kent was \$5,600 per year, including summer school; (jt. app. 14) his contract at American University was for \$3,450, not including summer school for which he expected to be paid an additional \$1,000. (jt. app. 23) Appellee decided that American University did not offer what he wanted and in March 1954 began to correspond for a job with other universities, which he said was the customary procedure for seeking employment. (jt. app. 20) Up until June 8, 1954, when he was hospitalized as a result of the accident, he had written about 75 letters and had what he thought was a "sure possibility" of a job at Texas University. (jt. app. 20) He later learned

that they had taken a local man because they hadn't heard from him during the time he was laid up. (jt. app. 20) During the last week of hospitalization, he had a stenographer come in and he continued writing for college employment. (jt. app. 20) Because of hospitalization and subsequent immobilization he could not take the opportunity for a personnel job in Portland, Maine, which paid \$1,000 for the summer. (jt. app. 23) By the time he was able to get around by himself the academic year had begun and there were no college teaching jobs, and so he started to look for a non-college job in order to pay living expenses. (jt. app. 22) While seeking a job he had a great deal of pain; quite often his leg hemorrhaged at night, leaving a pool of blood in the bed. (jt. app. 24) This was contrary to Dr. Rush's orders but he persisted because he had to find a job in order to live. (jt. app. 24) He had drawn his last salary check from American University about a week after the accident. (jt. app. 21) His local savings of \$600 were used for living expenses, his savings of \$1,500 in the pension fund at Kent was withdrawn and used for living. (jt. app. 21, 22) Having no income or other source of funds, he borrowed from two banks and a friend. (jt. app. 21, 22) He fell two months behind in his rent and was put out of his apartment, after suit filed, although he borrowed from a bank and paid his rent. (jt. app. 22, 23) In March 1955 he went to the Veterans Administration and, after examination, was granted \$66.15 monthly as a permanent disability pension. (jt. app. 23)

A friend of appellee's in Scarsdale, New York, invited him to spend the summer there. (jt. app. 23) He did, and on October 1, 1955, went to Winter Park, Florida, and found a job the following January. (jt. app. 28) From January until he went to the hospital the following October, appellee earned an average of \$45-50 per week. Following his arrival in Winter Park, he started having terrific stomach pains after meals and suffered loss of energy. (jt. app. 25) This pain persisted for about a year and he went to Dr. Ramsey in Winter Park

who found him suffering from a "bleeding ulcer" and sent him to the hospital on October 19, 1956. (jt. app. 25) A bleeding occurs because the ulcer has eroded to a depth enough in the duodenum to permit the exposure of a blood vessel and erode right through it so that there is no protection for it, and it bleeds, similar to a real severe abrasion to the skin. (jt. app. 57) In an acute blood loss the manifestations would be those of shock: the patient would collapse, unable to arise, his skin would be cold, clammy, blood pressure low, pulse rapid, and the patient would need immediate replacement of the blood lost. (jt. app. 57) In the case of the "oozing" type of bleeding, the patient would suffer progressive weakness, easy fatigue, no ambition, no desire to do anything except lie down and rest. (jt. app. 57) Appellee was discharged after 26 days, on November 14, 1956, after having had 10 X-rays, 4 blood transfusions, and treated by Dr. Ramsey every day. (jt. App. 26, 27) Before the accident he had never had trouble eating - he had had a "cast iron stomach." (jt. app. 27) During his hospitalization appellee lost 20 pounds. (jt. app. 56)

Appellee came to Washington for the trial of this case and was examined by Dr. John C. Sullivan on November 19, 1956, who found an active duodenal unhealed ulcer with tenderness over the area, hematocrit a few points below normal, and no evidence of a previous ulcer. (jt. app. 56) Appellee's duodenal bleeding ulcer would be produced by the emotional stress, harassment, and frustration he suffered following the accident. (jt. app. 60) Speaking of appellee's worry, stress and strain, Dr. Sullivan said he thought it caused the ulcer. (jt. app. 68) It is painful and interferes with the patient's daily work and ordinary activities. (jt. app. 56)

Appellee incurred charges in Georgetown Hospital during his stay caused by the accident in the sum of \$420.70. (jt. app. 19) Dr. Rush's bill for treatment of the injuries caused by the accident was \$325. (jt. app. 24) Appellee's \$80 suit and \$35 eye-glasses were ruined by the accident. (jt. app. 28) Appellee's bill for his hospitalization

for his bleeding duodenal ulcer at Winter Park was about \$600 (jt. app. 26), Dr. Ramsey's bill for treatment of the ulcer was \$177 and Dr. Sullivan's bill was \$50. (jt. app. 27). Appellee spent three dollars a day for one and one-half months for taxi fares. (jt. app. 20).

SUMMARY OF ARGUMENT

Appellant complains that the trial court abused its discretion in denying his motion for a new trial on the grounds that the verdict of the jury was excessive and contrary to the evidence. This court has no power to review the facts; it cannot disturb the verdict for mere excessiveness. This rule is well settled in this jurisdiction and all federal appellate courts, following a long line of Supreme Court decisions.

Appellant does not allege that the trial Court's charge was improper or prejudicial; he does not complain of any improper conduct on the part of appellee's counsel. He does not specify any act or word that caused the jury to return a verdict allegedly based on passion and prejudice. He merely expresses dissatisfaction with the size of the verdict and would have this Court hold that the trial court abused its discretion in not inferring passion and prejudice from the size of the verdict alone.

Appellant also complains that the trial court should not have ordered a remittitur. Again, he gives no reason other than that he believes that the verdict of the jury was excessive and therefore the result of passion and prejudice. He does not point to any proof in the record supporting his charge of passion and prejudice. The Supreme Court approved the use of the remittitur as long ago as 1822 and its application since then has been a salutary influence in the administration of justice in avoiding needless new trials.

Appellant also complains that the trial judge permitted counsel for appellee to write figures on the blackboard during his oral argument to the jury. However, appellant's brief in support of this charge of abuse of discretion merely serves to prove that counsel for appellee properly referred to the testimony and the conclusions and inferences fairly deducible therefrom.

Finally, appellant complains that the trial court coerced the verdict by his handling of the jury. Examination of the facts reveals that the trial court, solicitous for the personal convenience of the jurors, offered the jury another half hour to deliberate so that they would not have to return the following morning.

This court, can reverse the ruling of the trial court in denying a new trial only when it is clearly shown that there has been an abuse of discretion. Appellant has failed to carry this burden.

ARGUMENT

I. THIS COURT CANNOT REVIEW THE TRIAL COURT'S
DECISION TO DENY A NEW TRIAL ON THE GROUNDS
THAT THE VERDICT WAS EXCESSIVE AND CONTRARY
TO THE EVIDENCE.

Appellant's dissatisfaction with the size of the verdict cannot be relieved in this Court. "It is settled that we cannot review a trial court's decision to grant or deny a new trial on the ground that a verdict was excessive or inadequate." Feltman v. Sammon, 82 App. D. C. 404, 166 F. 2d 312.

The Per Curiam opinion in the Feltman case cited Washington Times Co. v. Bonner, 66 App. D. C. 280, 86 F. 2d 836, in which Justice Stephen had stated, at page 293:

"In any event, we are not at liberty to reverse on account of the size of the verdict. The rule is well settled in the Federal courts, not only in libel actions but also in general, that an appellate tribunal will not review the action of a trial court in granting or denying, for excessiveness or inadequacy of the verdict, a motion for a new trial.

That "the rule is well settled in the Federal courts" - and has been for many years -- is proved by an examination of Supreme Court decisions as far back as Railroad Company v. Fraloff, 100 U.S. 24, 25 L. Ed. 531. There, at page 31, Mr. Justice Harlan stated the Court's authority in the premises:

"No error of law appearing upon the record, this court cannot reverse the judgment because, upon examination of the evidence, we may be of the opinion that the jury should have returned a verdict for a less amount. If the jury acted upon a gross mistake of facts, or were governed by some proper influences or bias, the remedy therefore

rested with the court below under its general power to set aside the verdict * * * Our authority does not extend to a re-examination of facts which have been tried by the jury under instructions correctly defining the legal rights of parties."

Appellant does not contend that the trial court's charge to the jury was incorrect in any respect. (Jt. App. 83) The jury took the case under proper instructions as to the law and after deliberating upon the facts adduced in testimony and evidence returned a verdict which the appellant thinks is too large. The remedy for an excessive verdict lies with the trial court -- alone. This was stated precisely by the Supreme Court in Erie Railroad Co. v. Winter, 143 U.S. 60, 75, 12 S. Ct. 356, 36, L. Ed. 71:

"Whether the verdict was excessive, is not our province to determine in this writ of error. The correction of that error, if there were any, lay with the Court below upon a motion for a new trial, the granting or refusal of which is not assignable for error here."

Even if appellant persuaded this Court to share his opinion that the verdict was too large, that would not be sufficient, standing alone, for disturbing the trial court's ruling. Mr. Justice Holmes pointed this out in Southern Ry. - Carolina Division v. Bennett, 233 U.S. 80, 86, 34 S. Ct. 566, 58 L. Ed. 860:

"The supposed error most insisted upon is the entering of judgment upon a verdict said to be manifestly excessive. It is admitted that the judge charged the jury correctly. * * * but it is thought to be apparent as a matter of law that the jury found more than the charge or the law allowed. * * * But a case of mere excess

upon the evidence is a matter to be dealt with by the trial court. It does not present a question for re-examination here upon a writ of error. Lincoln v. Power, 151 U.S. 436; Herencia v. Guzman, 219 U.S. 44, 45. The premises of the argument for the plaintiff in error were not conclusive upon the jury, and although the verdict may seem to us too large, no such error appears as to warrant our imputing to judge and jury a connivance in escaping the limits of the law."

That the Supreme Court meant this rule to bind the circuit courts of appeals is stated by Mr. Justice Brandeis in Fairmont Glass v. Cub Fork Coal Co., 287 U.S. 474, 481, 53 S. Ct. 252, 77 L. Ed. 439:

"The rule that this Court will not review the action of a federal court in granting or denying a motion for a new trial for error of fact has been settled by a long and unbroken line of decisions; and has been frequently applied where the ground of the motion was that the damages awarded by the jury were excessive or were inadequate. The rule precludes likewise a review of such action by a circuit court of appeals."

The circuit courts of appeals have followed this salutary rule. The 2nd Circuit in Herzig v. Swift & Co., 154 F. 2d 64, 66, recognized it:

"There was, therefore, evidence as to the damages and, though the verdict may have been generous, the amount of the damage sustained was a question of fact not reviewable in this court on appeal."

The 5th Circuit held similarly in Reid v. Nelson, 154 F. 2d 724, 725:

"* * * the question whether the verdict is excessive or not is one exclusively for the trial court to determine, and is not subject to be re-examined in a federal appellate court."

The 8th Circuit has been governed by this rule in Chicago & N. W. Ry. Co. v. Green, 164 F. 2d 724 and in Kurn v. Stanfield, 111 F. 2d 469, and in other cases cited in Kurn.

Appellant cites the 4th Circuit case of Virginia Ry. Co. v. Armentrout, 166 F. 2d 400, which reversed the trial court's refusal to grant a new trial. The reason for the court's action is found at page 406:

"It is a reasonable assumption that this prejudicial charge to which exception was taken influenced the jury adversely to defendant and was a contributing factor in causing the jury to return a verdict in an excessive amount."

Appellant does not claim that there was any prejudice in the trial court's charge - or any where else, except in the size of the verdict. It is helpful to compare the verdict in the case at bar with the verdict in the Virginia Ry. Co. The court discusses that verdict in language contained between the headnotes (10-12) and (16) quoted by appellant:

"(13) There can be no question that the award of \$160,000 here was greatly in excess of any proper award. *** The present worth of such an annuity of \$3,000 per year, the loss of earning power estimated by the judge, would be less than \$85,000, or but little less than half of the verdict awarded. Surely, no such verdict should have been allowed to stand."

"(14, 15) * * * It is for the jury to fix the amount but they must do this within the bounds of reason, and a verdict on which the mere interest at 3% amounts to more than five times the maximum allowed by the state compensation laws and \$1,800 per year more than the judge estimates the loss of adult earning power is manifestly too much."

Appellant cites a Missouri case, Day v. Union Pacific Co.

, 276 S. W. 2d 212, which he states has "a somewhat similar factual situation on damages." There, the plaintiff, following the accident, went to a hospital for x-rays and then returned to the scene and drove his tractor-trailer - "had no difficulty" in driving it back to Kansas City, Missouri, from Topeka, Kansas. He stayed in bed the next day, remained in bed for a week, and took heat treatments. He did not offer any other evidence as to when, for whom, or at what wages he worked after the collision. Yet, even in this "somewhat similar" case, the Court, in upholding the trial court's granting a new trial to defendant, stated at page 216: "While the evidence considered in the light most favorable to plaintiff, would have supported opposite findings, * * *" The court would have upheld the trial court's denying a new trial to defendant. This it would have done because:

"It follows then that the trial court's order must be sustained unless all of the evidence as to plaintiff's injury and damage, viewed in the light most favorable to sustention of the trial court's ruling, shows that there was no substantial basis for the order."

That the court in the Day case did not reverse because of its own opinion of the size of the verdict is shown by the following, at page 216:

"In ruling whether a verdict was so excessive as to indicate bias and prejudice of the jury, the trial court, unlike an appellate court, weighs the evidence."

Appellant's failure to specify any instance of appeals made to passion and prejudice leaves him with only the contention that this Court should infer passion and prejudice from the size of the verdict alone. In the Day case the court cited Bailey v. Interstate Automotive, 358 Mo. 1121, 219 S. W. 2d 333, which latter court stated at page 340:

"And we bear in mind the trial judge participated in the trial and knew what took place, much of which cannot be preserved in any record. It has been said that, in view of the trial court's opportunity to measure the general effect of the trial proceedings on the jury, the trial court may infer bias and prejudice from the size of the verdict alone."

This common-sense observation would leave to the trial court in the case at bar the power to infer bias and prejudice. This the trial court refused to do in denying appellant's motion for a new trial. Now, appellant would have this Court draw that inference.

A sound reading of the Counterstatement of the Case shows that the jury had substantial evidence of the appellee for its consideration. Hence, as Mr. Justice Hughes stated in Herencia v. Guzman, 219 U.S. 44, 14 S. Ct. 387, 55 L. Ed. 81:

"As there was evidence proper for the consideration of the jury, the objection that the verdict was against the weight of evidence, or that the damages allowed were excessive, cannot be considered."

The same rule was stated by Mr. Justice Douglas in United States v. Socony-Vacuum Oil Company, 310 U.S. 150, 248, 60 S. Ct. 811, 855, 84 L. Ed. 1129:

"Certainly, denial of a motion for a new trial on the grounds that the verdict was against the weight of the evidence would not be subject to review."

The 8th Circuit Court in Southern Ry. Co. v. Walters, 47 F. 2d 3, 7, observed the rule:

"It is seriously urged that the court erred in denying defendant's motion for a new trial. This court has often held that a motion for a new trial on the ground that the verdict is not sustained by the evidence is addressed to the discretion of the trial court, and its ruling thereon will not be reviewed on appeal.* * * This is not a case in which the lower court arbitrarily refused to consider the motion for a new trial, but it appears from the record that, after very careful and thoughtful consideration of the motion, the court denied the same."

Appellant does not allege that the trial court refused or failed to give careful and thoughtful consideration to his motion. As the argument in his brief shows, he merely continues his disagreement with the trial court's ruling that appellee's evidence was sufficient to deny a new trial. It would not be profitable for appellee to engage in discussion and analysis of the evidence because the foregoing rule precludes this court from weighing the evidence. This was a personal injuries case, the very type of case which calls for the unique function of the jury to determine damages. As the court said in Fornwalt v. Reading Co., (U.S.D.C. Pa. 1948) 79 F. Supp. 921, 923, cited by appellant:

"Where the damages are unliquidated and there is no fixed measure of mathematical certainty, no precise rule or yardstick for translating injury into money, courts in general are reluctant to disturb a jury's verdict on the ground of excessiveness. This is particularly true in respect to damages in tort actions for personal injury."

II. THE TRIAL COURT HAD THE POWER TO DENY APPELLANT'S MOTION FOR A NEW TRIAL UPON CONDITION THAT APPELLEE FILE A REMITTITUR OF A PORTION OF THE VERDICT.

Appellant was dissatisfied with the verdict of the jury and is not satisfied with the judgment for a smaller amount entered thereon by the trial court. He demands a complete new trial even though "The consequences has been to prolong litigation, to swell bills of cost, to delay final adjudication, and, in a large number of instances, to have such excessive judgments repeated over and over, upon the new trial." Correction of Damage Verdicts by Remittitur and Additur, 44 Yale L. J. 318.

Appellant disagrees with the trial judge's opinion of the amount by which the jury's verdict was generous; he does not allege that the jury should have returned a verdict for him. He attacks the use of the remittitur in this case but the practice is well settled, as stated in 44 Yale L. J. 318, *supra*:

"When the jury has returned a verdict for unliquidated damages which the trial court deems excessive, but not caused by passion or prejudice, most American jurisdictions allow the court to deny a new trial on condition that the plaintiff agree to a remission of the excess above an amount which the court considers reasonable."

The practice has been endorsed by the Supreme Court and the reasons therefor given in Arkansas Valley Land & Cattle Co. v. Mann, 130 U.S. 69, 74, 9 S. Ct. 458, 32 L. Ed. 854:

"The practice which this court approved in Northern Pacific Railroad v. Herbert is sustained by sound reason, and does not, in any just sense, impair the constitutional right of trial by jury. It cannot be disputed that the court is within the limits of its authority when it sets aside the verdict of the jury and grants a new trial where the damages are palpably or outrageously excessive.* * * Yet, in considering whether a new trial should be granted upon that ground the court necessarily determines, in its own mind, whether a verdict for a given amount would be liable to the objection that it was excessive. The authority of the court to determine whether the damages are excessive implies authority to determine when they are not of that character. To indicate before the passing upon the motion for a new trial, its opinion that the damages are excessive, and to require a plaintiff to submit to a new trial, unless, by remitting a part of the verdict he removes that objection, certainly does not deprive the defendant of any right, or give him any cause for complaint."

In short, appellant has no cause for complaint because the trial court entered judgment for \$17,500 instead of \$25,000.

The age of the practice was commented upon by Mr. Justice Sutherland in Dimick v. Schiedt, 293 U.S. 474, 482, 55 S. Ct. 296, 79 L. Ed. 603:

"There is a decision by Mr. Justice Story, sitting on circuit, authorizing such a remittitur as early as 1822. Blunt v. Little, 3 Mason 102. There, the jury returned a

verdict for \$2,000 damages, suffered as a result of a malicious arrest. Defendant moved for a new trial on the ground that the damages were excessive. The court asserted its power to grant a new trial upon that ground, but directed that the cause should be submitted to another jury unless plaintiff was willing to remit \$500 of the damages. This view of the matter was accepted by this Court in *Northern Pacific R. Co. v. Herbert*, 116 U. S. 642, 646-8, and has been many times reiterated.**** Since the decision of Mr. Justice Story in 1822, this court has never expressed doubt in respect to the rule, and it has been uniformly applied by the lower federal courts."

And, predicted the Court at page 485: "* * * we may assume that in a case involving a remittitur, which this case does not, the doctrine would not be reconsidered or disturbed at this late day."

A simple but sound justification for the practice was given by the Court at page 486:

"Where the verdict is excessive, the practice of substituting a remission of the excess for a new trial is not without plausible support in the view that what remains is included in the verdict along with the unlawful excess -- in that sense that it has been found by the jury -- and that the remittitur has the effect of merely lopping off an excrescence."

Mr. Justice Stone, at page 497 in the same case, used a familiar analogy to explain the practice:

"The trial judge who denies a motion for a new trial, because the plaintiff has consented to reduce or a defendant has consented to increase the amount of the recovery, does no more than, when sitting in equity, he withholds relief upon the compliance with a condition, the performance of which will do substantial justice."

Appellant cites Southern Pacific Co. v. Guthrie, 180 F. 2d 295, for the proposition that a remittitur cannot cure a verdict based on passion or prejudice. However, regarding appellant's contention that the appellate court can infer passion or prejudice from the mere size of the verdict, the 9th Circuit Court has this to say, immediately following its language quoted by appellant:

"Some authorities hold that passion and prejudice may not be inferred from the mere excessiveness of the verdict, proof of appeals to passion and prejudice not appearing in the record. Larsen v. Chicago & N. W. R. Co., 7 Cir., 171 F. 2d 841, 845.* * * There is an abundance of authority in the decisions of the federal courts that in this situation an appellate court has no power to do anything about such a verdict. The view most commonly expressed is that stated by Judge Goodrich, for the Court of Appeals of the Third Circuit, in Scott v. Baltimore & O. R. Co., supra, as follows: 'A long list of cases in the federal courts demonstrates clearly that the federal appellate courts, including the Supreme Court, will not review a judgment for excessiveness of damages even in cases where the amount of damage is capable of much more precise ascertainment than it is in a personal injury case.'"

The court in the above case not only refused to grant a new trial but did so on the ground that there was no proof of appeals to passion and prejudice appearing in the record. In that significant respect that case is similar to the case at bar and should be cited in support of appellee.

The 7th Circuit Court in Larsen v. Chicago & N. W. R. Co., cited in the Southern Pacific Co. case also contributed a thought that is pertinent to the circumstances of the case at bar, at page 845:

"We have no authority to tamper with the jury's verdict * * * Moreover, it is now well settled that the fixing of the amount of damages in an action for personal injuries is peculiarly within the province of the jury, there being no regular standard by which to measure,"

Appellant cites Minneapolis, St. P. & S. S. M. Ry. Company v. Moquin, 283 U.S. 520, 51 S. Ct. 501, 75 L. Ed. 1243, in which the petitioner moved to set aside the verdict of the jury on the ground that the misconduct of respondent's counsel in making appeals to passion and prejudice had prevented an impartial trial. The state court, at 181 Minn. 63, 64, 231 N.W. 829, 833, had found: "From the entire record before us we are of the opinion that the verdict is excessive because of passion and prejudice." Of this Mr. Justice Roberts, in the language quoted by appellant, said: "The finding is quoted above, and our sole concern is as to the action it requires. * * * Obviously such means may be quite as effective to beget a wholly wrong verdict as to produce an excessive one." Appellant should gain no comfort from this language. The trial court did not make a finding of passion and prejudice in the case at bar. Appellant does not allege that the verdict of the jury was "wholly wrong": the jury found appellant liable for appellee's damages.

Appellant cites another case which does not support his position in the case at bar, National Surety Co. v. Jean, 6 Cir., 61 F. 2d 197, as will be seen from the following language which, in the opinion, immediately precedes that quoted by appellant:

"The court determined the motion in a memorandum opinion which gave particular consideration to the co-related grounds (1) and (9). The opinion stated: 'So it is now before me on motion for a new trial, the main ground of which is the 'damages assessed by the jury are excessive.' I should have said that the present jury fixed the damages at \$25,000.00 and it is argued now that it is unreasonable and shows malice, caprice or excitement and that it is for that reason I should at least order a remittitur.' (Italics ours.)

"Then, after a rather full discussion touching the elements of damage involved, the court concluded that its conscience would rest easy if it should suggest a remittitur of \$5,000. The memorandum continued: 'I believe if a remittitur of \$5,000.00 be entered I will overrule the motion for a new trial.'"

It is abundantly clear that the trial court in National Surety had found "malice, caprice or excitement" and for that reason ordered the remittitur. Appellant does not claim that the trial court in the case at bar made such a finding - nor does he claim that the trial court should or could have made such a finding.

Appellant quotes language from Brabham v. State of Mississippi, 5 Cir., 96 F. 2d 210, which does not explain why the court acted as it did. It is enlightening to read the language immediately preceding that quoted by appellant:

"We agree with appellants, too, that a new trial ought to have been granted instead of trying to ameliorate a verdict which the trial judge concluded was oppressive and amounted to an injustice. The resentment and revulsion of feeling against what the jury apparently regarded as acts of high-handed oppression on the part of a petty officer, and as callousness toward those acts implied in retaining him in office, evidenced by the highly punitive character of the verdict, while natural and reasonable enough in determining who should be selected as officers of a community, have no place in the jury room."

And, following the language quoted by appellant, is further explanation of the court's action in the premises:

"The District Judge felt as the jury did, and as we do, the outrageousness of Varnardo's conduct, if, as the jury evidently believed, the circumstances of the arrest were as plaintiff's evidence declared them to be. He regretted, as we do, that the jury in the course of considering the damages appropriate to be awarded was carried away by a sense of that outrage. He thought that a remittitur would restore to the verdict the cool justice that it lacked."

It is apparent that the Brabham case has no common ground with the case at bar - a not extraordinary personal injuries suit.

Again, in citing Fornwalt v. Reading Co., supra, appellant quotes language which fails to inform, and requires that additional language of the opinion be set forth. It is the trial court itself which is quoted as follows, at page 922:

"When the verdict was returned we advised counsel at side bar that we thought the amount of the verdict was excessive.* * * However, after a study of the briefs of counsel and an independent study of the authorities and, in the light thereof, a thorough consideration of the testimony, we are confirmed in our judgment that the verdict was grossly excessive, and that the cause should be submitted to another jury unless the plaintiff is willing to remit a part of the damages awarded."

Thus read, the Fornwalt case supports the trial judge's action in the case at bar. A fortiori, for the court in the former case made a finding that the verdict of the jury was "grossly excessive."

Another case cited by appellant, Ona v. Reachi (Cal., 1951) 105 C. A. 2d 758, 761, 233 P. 2d. 949, 951, supports the position of appellee, as will be seen from the following:

"Inasmuch as the symptoms indicative of plaintiff's condition were almost entirely subjective, the credibility of plaintiff and the soundness of the opinions of the experts presented which were exclusively for the triers of the facts, the jury in the first instance, and upon motion for a new trial the trial judge. These are not questions for a reviewing court. The trial judge was of the opinion that the verdict was contrary to the weight of the evidence. So believing, it was his duty to either reduce the damages as a condition to denying the motion or to grant a new trial."

Which was exactly what the trial judge did in the case at bar.

Appellant's allegation of passion and prejudice without offering any proof makes it worthwhile to discuss the necessity of some finding of such bias. In Schwer v. N. Y. C. & St. L. R. Co., 161 Ohio St. 15, 117 N. E. 2d 696, the lower court had specifically found that the excessive judgment was not due to passion or prejudice. In Chester Park Co.

v. Schulte, 120 Ohio St. 273, 166 N. E. 186, the court affirmed the use of a remittitur by the lower court and in its opinion referred to Spear & Co. v. Fulton, 92 Ohio St. 523, 112 N. E. 1086, in which a jury verdict was reduced with the consent of the plaintiff. The defendant appealed and argued that the trial court had said that the verdict had been reached based on passion and prejudice. The trial court did not make such a journal entry. The remittitur was upheld by the circuit court which affirmed the "doctrine that the situation is controlled by the Court finding or not finding as a fact that the jury was influenced by passion and prejudice." In the Chester Park opinion, the court also referred to Ohio Tractor Co. v. Shearer, 97 Ohio St. 332, 120 N. E. 878, and Capital City Dairy Co. v. Amicon, 99 Ohio St. 443, 126 N. E. 925, in both of which cases the lower courts ordered remittiturs on the ground of excessiveness but did not make findings that the juries were not influenced by passion and prejudice.

In the case at bar the failure of the trial court to make an express finding that the jury verdict was not influenced by passion and prejudice cannot be interpreted to mean that it was. The denial of appellant's motion settled that. For, as was stated in Bailey v. Interstate Automotive, supra:

"It is clear there is a vital distinction between mere excessiveness (or inadequacy) of an award, and such excessiveness (or inadequacy) as would indicate a verdict was the result of bias and prejudice; the former may be but an honest mistake of the jury, while the latter savors of misbehavior on the part of the jury."

Appellant failed to make that distinction successfully in his argument on the motion for a new trial. His brief now ignores it - though it is indeed "vital."

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN PERMITTING COUNSEL FOR APPELLEE TO USE THE BLACKBOARD DURING FINAL ARGUMENT.

Appellant's request that the trial court deny to appellee the benefit of having his counsel use the aid of the blackboard during his final argument to the jury was properly refused by the trial court. Appellant cites the case of Warren Petroleum Corporation v. Pyeatt (Texas, 1955) 275 S. W. 2d 216, in support of his position that the trial court abused its discretion. There, plaintiff's counsel had displayed three charts, two of which dealt with matters of liability and the third with damages. That the court's objection went to their use as unsworn testimony rather than as argument is shown by the following, at page 218:

"Most of the statements in the first two charts are plain positive factual unsworn statements and were not put there during the argument on each point and not as a reasonable deduction from the evidence. The statements and figures in the third chart were not put there during the argument and as a reasonable deduction from the evidence. Oral argument, with proper references to the testimony and evidence that would reveal such factual statements made orally in argument without any reference to or inference from the evidence is error. An attorney cannot testify orally in his argument, and what he cannot do orally he certainly cannot do in writing."

A reading of the portion of the oral argument of counsel for appellee quoted by appellant shows that counsel for appellant interrupted when a reference was made to the value of "the summer job." Objection was made to "the summer school job." But, of course, appellee

had testified that he had had an opportunity for a personnel job in Portland, Maine, which paid \$1,000 for the summer (jt. app. 23) as well as the expected summer school at American University for \$1,000. (jt. app. 23) The trial court's comment on the interruption of appellant's counsel, "I think he said it would be a thousand dollars" makes the point that appellant's counsel was merely matching his recollection of the testimony with that of counsel for appellee - and at the expense of the latter's time for oral argument. The trial court properly observed, "That is my recollection; but the jury will recall." It was indeed a question of fact to be determined by the jury - an exercise of their unique function.

When appellee's counsel gave \$4,500 as the value of the academic year, appellant's counsel also did not recall that appellee had testified that the "year goes on for the summer school, until September." (jt. app. 36) The trial court reminded appellant's counsel that he could argue that point to the jury. Here again counsel was matching recollections instead of leaving it to the jury.

Appellant also complains that, after the above interruptions of his counsel, appellee's counsel made an error in addition in the very last minute granted by the trial court. It was immediately corrected by counsel for appellee upon it being called to his attention by appellant's counsel. Of course, it was the turn of appellant's counsel to argue and he could have corrected it, immediately - and effectively. Certainly, the jury was not misled

Appellant complains not that the jury did not hear testimony regarding an \$80 suit and \$35 eye-glasses (jt. app. 28) and taxi fares (jt. app. 20) but only that counsel for appellee should not have referred to the same. In the next to the last sentence of his argument quoted by appellant, counsel for appellee told the jury that "you are free to give your own values to them." In his immediately following oral argument, counsel for appellant had the opportunity to point out to the

jury that the testimony of value of the suit and eye-glasses did not allow for depreciation and that perhaps the free rides given by the good neighbor might have been included in the estimated total for taxi fares. Of course, the values given by appellee could be attacked; but appellant could not expect counsel for appellee to do it for him.

The rest of appellant's objection to the argument of appellee's counsel is found in his brief under the heading: "(b) Items displayed on the blackboard which did not result from the accident." This description of his contention invites the only answer: It was for the jury to decide what items resulted from the accident. And for the trial court to correct error in that decision - if any there were.

Reading the argument of appellee's counsel quoted by appellant and considering the testimony, in the light most favorable to appellee, it is clear that counsel for appellee stayed well within the limits of proper argument, as set forth in 53 Am. Jur.. (Trial):

" * * * It is now generally conceded that counsel properly may state his views thereon, and on the conclusions fairly deducible from the evidence in the case. Where there is some evidence before the Court from which facts stated by counsel in argument can be inferred, he is justified in making such inferences although the evidence by which they are sought to be maintained is not strong or clear."
(page 392)

" * * * likewise there is no objection to statement by counsel, in argument, as to what, under the evidence, he considers a fair compensation for injuries received."
(page 391)

Appellant alleges that the jury accepted the \$19,300 total given by counsel for appellee and, in passion and prejudice, gave said counsel a fee of \$5,700 but gave nothing to appellee for his pain and suffering.

A rather remarkable misdirection of passion and prejudice. And an untenable argument.

IV. THE TRIAL COURT DID NOT COERCE THE VERDICT WHEN IT OFFERED THE JURY AN ADDITIONAL HALF HOUR FOR DELIBERATION.

That appellant charges the trial court with coercion of the verdict is clear from the following from his Brief:

"3. Whether the trial court abused its discretion in denying appellant's motion for a new trial after the trial court, in the handling of the jury, instructed the jury that if it did not arrive at a verdict by 6:30 p. m. on Friday evening, the jury would have to report on the case at 10:00 a. m. on the next day, Saturday." (Statement of Questions Presented.)

"4. The trial court did not handle the jury properly in informing the jury that if a verdict was not arrived at by 6:30 p. m. Friday, November 30, 1956, the jury would have to report back on the case on Saturday, December 1, 1956." (Statement of Points.)

"5. The trial court did not handle the jury properly in instructing that it would have to return on the case on a Saturday morning, December 1, 1956." (Summary of Argument.)

The above is not an accurate report of what happened. A reading of the colloquy between the trial court and the foreman of the jury quoted by appellant shows that the jury had found appellant liable for damages but had not yet agreed on the amount of the award. Although it was only six o'clock p. m., the trial court expressed concern for the jurors' private obligations and stated that he was going to allow them

to separate until the following morning - unless there was a likelihood of reaching an agreement within a reasonably short time. The foreman stated that there was a possibility of agreeing with another half hour of deliberation. Appellant did not object to the offer or acceptance of this additional half hour. It was after the jury had retired that the trial court used the word "if".

The trial court did not "inform" or "instruct" the jury that "if" it did not return a verdict within a half hour it would have to report back the following morning. Rather, a reading of the colloquy indicates the trial court's concern for the jurors' personal convenience rather than any attempt at coercion. To assume, as appellant does, that the jurors would violate their oaths because of speculative slight interference with their leisure time, would be to make a travesty of the jury system. Further, appellant does not reveal the reasoning which led him to conclude that a hurried verdict must be a larger verdict. Of course, it was not a "hurried" verdict: the jury had been deliberating for almost three hours on a single personal injuries case.

The trial court's handling of the jury can be tested by the following statement of the general practice, in 53 Am. Jur. (Trial) 671:

"It is familiar practice for a court to recall a jury after they have been in deliberation for any length of time for the purpose of ascertaining what difficulties they have, and of making proper efforts to assist them in the solution of their difficulties. The time at which such recall shall be made, if at all, rests in the sound discretion of the trial court to inquire whether they are likely to reach a verdict at any early date, to urge a further consideration of the case in hope that an agreement may be reached, and to urge on the jurors an earnest effort to agree. In so doing, the court should emphasize in language readily understood that

it is not endeavoring to inject its own ideas into the minds of the jurors as to the verdict they should find, and further, that in nothing said does the court intend or mean that any juror should surrender his own free will and judgment. "

So, the trial court in the case at bar certainly did not abuse its discretion in recalling the jury and inquiring about the possibility of reaching a verdict after further deliberation.

How far from coercion was the trial court's handling of the jury in the case at bar is seen from the following comparison, from 53 Am. Jur. (Trial) 675:

"However, where the jurors are told that unless they return a verdict by a certain time, they will have to remain together for a specified time thereafter on account of the inability of the court to receive their verdict, but they are accorded the privilege of returning a sealed verdict in the event of an agreement, or where they are told that unless an agreement is reached by a specified time, at which the absence of the judge becomes necessary, they will be permitted to separate until Monday morning, a verdict returned within the time specified will not be regarded as coerced. "

That the trial court in the case at bar did not abuse its discretion in giving the jury another half hour to deliberate after the foreman had stated that it was worth trying, is supported by the following, from 53 Am. Jur. (Trial) 677:

"How long a jury is to be kept in deliberation is a matter resting within the sound judicial discretion of the trial judge. His action in keeping them confined for a reasonable

time, refusing to discharge them at their request, or sending them back for further deliberation, does not as a rule amount to coercion of the verdict. No specific period can be designated, nor can any absolute rule be laid down, to control the court's discretion. So long as a further argument and comparison of views may aid in bringing about a unanimous verdict, jurors may properly be kept together to continue such comparisons of views and statement of argument."

The correct interpretation of the trial court's handling of the jury in the case at bar is simply that the trial judge sacrificed his own convenience by remaining in his chambers another half hour in order to save the jurors the inconvenience of returning on Saturday morning.

CONCLUSION

It is settled law in this jurisdiction that the action of the trial court in granting or refusing a new trial is not reviewable unless there has been an abuse of discretion. Kenyon v. Youngman, 59 App. D. C. 300, 40 F. 2d 812; Capital Traction v. Sneed, 58 App. D. C. 141, 26 F. 2d 296. Appellant has failed to show that the trial court abused its discretion in denying his motion for a new trial on any of the grounds alleged.

Therefore, appellee respectfully requests this Court to affirm the order of the trial court.

Respectfully submitted,

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BRIEF FOR APPELLANTS
AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

*United States Court of Appeals
For the
District of Columbia Circuit*

FILED MAY 17 1957

No. 13,756

Frederic W. Stewart
CLERK

ROBERT E. HAYCOCK, JR., and
STANDARD FLOORS, INC.,

894
v.

Appellants

RICHARD B. CHRISTIE,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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STATEMENT OF QUESTIONS PRESENTED

In the opinion of the appellants, the questions are:

1. Whether the trial Court abused its discretion in denying appellants motion for a new trial upon the following:

- a. That the verdict was grossly excessive, unconscionable and one which should have shocked the conscience of the Court.
- b. The verdict was contrary to the evidence, the weight of the evidence, and to law.

2. Whether the Trial Court abused its discretion in denying appellants motion for a new trial, and committed error, when the Trial Court permitted counsel for appellee in addressing the jury, to use the blackboard in exhibiting to the jury, items and amounts of damages which had not been introduced or established in evidence and which were strictly speculative and without foundation in evidence, after the Trial Court, upon request of counsel for the appellants, had instructed counsel for appellee not to so use the blackboard, and counsel for appellants had objected to such use of the blackboard.

3. Whether the trial Court abused its discretion in denying appellants motion for a new trial after the Trial Court, in the handling of the jury, instructed the jury that if it did not arrive at a verdict by 6:30 p.m. on Friday evening, the jury would have to report on the case at 10:00 a.m. on the next day, a Saturday.

4. Whether the Trial Court abused its discretion in denying appellants motion for a new trial by the use of a remittitur in connection therewith.

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UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 13,756

ROBERT E. HAYCOCK, JR., and
STANDARD FLOORS, INC.,

Appellants

v.

RICHARD B. CHRISTIE,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANTS

JURISDICTIONAL STATEMENT

This is an appeal in an action which was instituted in the United States District Court for the District of Columbia by appellee seeking recovery for damages resulting from alleged permanent physical injuries. Jurisdiction of the District Court was founded upon the provisions of Title 11, Sec. 305 and 306 of the Code of Law of the District of Columbia, 1951 Edition.

After trial and denial of a motion for a new trial final judgment was entered in favor of plaintiff for \$17,500.00. Defendants (appellants here) appeal. Jurisdiction of this Court is founded upon the provision of Title 28, Sec. 1291, United States Code.

STATEMENT OF THE CASE

This is an appeal taken from a final judgment for appellee in the United States District Court for the District of Columbia which denied a motion for a new trial upon the filing of a remittitur by appellee (Joint App. 9, 10).

In his complaint, appellee alleged that on June 8, 1954 while walking on the sidewalk of Wisconsin Avenue, N.W., Washington, D.C. he was struck and run over by a motor vehicle owned by appellant Standard Floors, Inc. and operated in a negligent and careless manner by appellant, Robert E. Haycock, Jr., employee agent of appellant Corporation; as a result of the accident he sustained severe injuries to his legs causing shock, mental anguish, pain and suffering and permanent physical injuries; as a result of these injuries he had been disabled and prevented from engaging in his normal profession as a college professor, or any gainful profession, and had suffered complete loss of earnings which he would continue to suffer in the future, and he had been and would be caused to expend large sums of money for medical care and hospital treatment (Joint App. 1, 2).

In their answers, appellants admitted the occurrence of the accident, ownership of the vehicle and employment of appellant Haycock; denied negligent and careless operation of the vehicle; avered they were without knowledge or information sufficient to form a belief as to the truth of the allegations concerning injuries, losses, expenses and damages; and set up the defenses of sole and contributory negligence (Joint App. 2-3).

Pretrial statements were filed (Joint App. 4-5) and the pretrial proceedings adopted the pretrial statements of the parties (Joint App. 4).

As the evidence during the trial was extensive, and all material portions of the transcript of the testimony are included in the joint

appendix. (Joint App. 12-79), and references have been made in the argument to specific portions of the testimony in the joint appendix, it is not considered practical to enlarge this statement of the case by further reference to specific portions of the testimony.

By his testimony (Joint App. 12-43) appellee claimed that the truck ran over both of his legs; he was taken by the truck to Georgetown Hospital where he remained for one month; he was teaching advertising at American University at the time under a contract for the fall-spring session, 1953-1954, at a salary of \$3,450 per annum; for one and one-half months after leaving the hospital he had to use crutches and a cane in getting around, with difficulty; there was pain and suffering from an ulcer on one of his legs; as early as March, 1954 he had started to seek employment elsewhere and he continued seeking employment after the accident; in seeking employment he had placed an advertisement in a magazine of national circulation and corresponded with in excess of 72 colleges, universities and business organizations in this country and abroad, and had personal contacts with some of them; the accident had caused him to suffer loss of employment in the summer school of American University and other employment that he could have obtained in Maine, both during the summer of 1954, and prevented him from getting employment until January 1956; the stress, strain and worry over his financial condition resulted in his having a duodenal ulcer during the fall of 1955; the accident resulted in his hospital and medical expenses pertaining to his legs, and his duodenal ulcer, and loss of employment from the date of the accident henceforth. Appellee's orthopedic physician testified that as a result of the accident there were no fractures, no injuries to the bones, no injuries to the ligaments, but there was injury to the soft tissues of his legs, with a skin ulcer on one leg; he could not give any percentage of disability of appellee; the shock suffered by appellee endured only for the day of the accident; and appellee could have resumed teaching during

November or December, 1954. (Joint App. 44-53). Appellee's internist testified that historically the injuries to the legs resulting from the accident did not cause the duodenal ulcer; that from the history given to him by appellee he presumed that the duodenal ulcer was caused by appellee's worrying over his financial condition; that he did not know what caused the duodenal ulcer; that he did not know appellee was employed when he examined him just before the trial; and that if appellee felt that he had security in his employment of 1956 that might be beneficial to appellee's condition (Joint App. 53-70).

As this appeal is not on the issue of liability but is on the phases set forth in the statement of points, no references are made to liability.

Appellant's orthopedic physician testified that during two examinations of appellee he discovered many degenerative conditions that existed prior to the accident; as a result of the accident there were no fractures but there were contusions and a skin ulcer on one leg; there was some disability but that appellee could have resumed teaching in November or December, 1954; the ulcer on the leg had healed when he had examined appellee just before the trial; and the lack of circulation in appellee's body was due to degenerative conditions and his age (Joint App. 70-74).

Dr. Bentley, Professor Emeritus of American University, testified that he conferred with applicants for positions at American University when appellee was there and appellee had informed him that he was seeking a position elsewhere; applicants for teaching positions apply well in advance of September in each year to get teaching positions; but Dr. Bentley did not testify concerning any summer school classes at American University during the summer of 1954, in appellee's subjects, nor did he testify of any contract or commitments that appellee had with American University concerning teaching in the summer school in 1954 (Joint App. 77-79).

Mrs. MacDonald in testifying for appellee stated that she and her husband were his friends and observed his pain and suffering and difficulty in getting around after the accident during the one and one-half months after he left the hospital, and that they had taken him around with them in their automobile on numerous occasions (Joint App. 74-76).

Appellee claimed in his testimony (Joint App. 12-43) that the accident further caused him to lose a position with Texas University at Austin but appellant's Exhibit No. 3 disclosed that the University had filled the position with an individual of its choice.

Prior to counsel for appellee summarizing his case to the jury, counsel for appellants objected to his using the blackboard to display any figures pertaining to damages. The Court overruled this objection whereupon counsel for appellants requested that counsel for appellee be permitted to use the blackboard for figures only to the extent of the figures in evidence. This request was granted and the trial court further instructed counsel for appellee that he could not use the blackboard in drawing upon their imagination or otherwise. (Joint App. 79-80). During summation to the jury by counsel for appellee counsel for appellants objected to certain items being placed on the blackboard but nevertheless the trial court permitted these items and other items to be placed on the blackboard, which counsel for appellants contended were speculative, imaginary, and not supported by the evidence (Joint App. 81-82).

At 3:45 p. m. on Friday, November 30, 1956, the case was given to the jury. The trial court called the jury back into the courtroom at 6:00 p. m. and instructed the jury that it was going to excuse them for the day but that they should return at 10:00 a. m. the next morning, Saturday, December 1, 1956, unless the foreman thought there was a likelihood the jury could arrive at a verdict in another one-half hour. The foreman of the jury replied that he thought it was worth trying, and the jury again retired on the case (Joint App. 86, 87).

At 6:30 p. m., Friday, November 30, 1956, the jury returned their verdict for appellee for \$25,000.00 (Joint App. 6).

Thereafter appellants filed their motion for directed verdict and/or for a new trial (Joint App. 7-9). After hearing thereon, the trial court issued its order denying the motion for directed verdict and providing that if within ten days appellee filed a remittitur of that part of the judgment in excess of \$17,500.00 the motion for a new trial would be denied (Joint App. 9-10). Appellee filed such a remittitur (Joint App. 10).

This appeal on the denial of the motion for a new trial followed.

STATEMENT OF POINTS

1. The verdict of twenty-five thousand dollars was grossly excessive, unconscionable, and should have shocked the conscience of the trial court beyond the use of a remittitur and to such an extent that a complete new trial should have been awarded.

2. The verdict was contrary to the evidences.

3. The trial court should not have permitted counsel for appellee, in addressing the jury, to exceed his authority in using the blackboard in exhibiting to the jury items and amounts of damages which had not been introduced or established in evidence and which were strictly speculative and without foundation in the evidence especially because counsel for the appellants had previously objected to such use of the blackboard and the trial court had sustained the objection and instructed counsel for the appellee as to the exact extent he could use the blackboard.

4. The trial court did not handle the jury properly in informing the jury that if a verdict was not arrived at by 6:30 p. m. Friday, November 30, 1956, the jury would have to report back on the case on Saturday, December 1, 1956.

SUMMARY OF ARGUMENT

1. The verdict of \$25,000.00 was grossly excessive and unconscionable, and should have shocked the conscience of the trial court beyond the use of a remittitur and to such extent that a complete new trial should have been awarded and, the verdict was contrary to the evidence.

a. Loss of Earnings

The accident did not cause any loss of earnings. The evidence established that appellee had been employed as a teacher less than one-half of the years of his employment. Furthermore, the evidence established that as early as March, 1954, (accident occurred on June 8, 1954), appellee had informed American University that he was not going to teach there in September, 1954 and that he was seeking employment elsewhere. The evidence established that before and after the accident appellee had, in seeking employment as a teacher and otherwise, inserted an advertisement in a magazine of national circulation and corresponded with and had personal contacts with in excess of 72 colleges, universities and organizations, and that he was not successful in getting a position anywhere until January, 1956. Although appellee claimed he had a prospect of getting summer employment in Maine and summer employment as a teacher in the summer school at American University, during the summer of 1954, and a teaching assignment at Texas University at Austin for the academic year 1954-5, the evidence did not disclose that he received any commitment from or had any contract, even tentative, for such employment. Nor did the evidence disclose what compensation he would have received from such claimed possible employment. Accordingly, the jury, in awarding appellee damages for claimed loss from employment engaged in passion, emotions, and prejudice, with a result that its verdict was grossly excessive, unconscionable, contrary to the evidence, and one which should have shocked the conscience of the trial court to such extent that a complete new trial should have been awarded.

The case law applicable dictates that a remittitur should not have been used, but to the contrary, it was the duty of the trial court to award a complete new trial, because the verdict was excessive, unconscionable and the result of passion, emotions and prejudice.

b. Medical Expenses, Damages To Suit And Eyeglasses

According to the evidence, the only medical expenses and other damages attributable to the accident were the following: Georgetown University Hospital bill in the amount of \$420.70, the bill of appellee's orthopedic physician, Dr. Rush, in the amount \$325.00; and damage to appellee's suit and eyeglasses in the total amount of \$115.00. Appellee was not entitled to full damages for his suit and eyeglasses because the suit had been used and the eyeglasses were not broken; as a matter of fact, appellee was using these eyeglasses at time of trial. Appellee was not entitled to his claimed expense of \$140.00 for use of taxicabs because the evidence established that his friends had transported him on numerous occasions during the one and one-half months after he left the hospital.

c. Claimed Expenses Resulting From Duodenal Ulcer

According to the evidence the duodenal ulcer did not result from nor was it connected with the accident. Appellee's local internist, Dr. Sullivan, the only witness produced by appellee to testify concerning the duodenal ulcer, established through his testimony that the accident had no causal relation to the duodenal ulcer. He further testified that the history concerning the ulcer which he had, was given to him by appellee. He did not treat appellee for that ulcer as appellee's hospitalization and treatment thereon occurred in Florida. Dr. Sullivan testified that he did not know what caused the ulcer but presumed that it was because of worry and stress and strain on the part of appellee. Furthermore, from the evidence, the first symptoms of the duodenal

ulcer occurred during October or November of 1955, more than one year after the accident. The jury, in awarding expenses for pain and suffering for the duodenal ulcer again engaged in passion, emotions and prejudice, and disregarded the evidence.

d. Entire Medical Aspect

The evidence established that as a result of the accident appellee had no fractures of his legs, no damage to the bone structure or supporting ligaments but merely damage to the soft tissues of his legs with a non-serious type of skin ulcer on one leg which did not heal as quickly as his orthopedic physician had expected because of lack of circulation. Through testimony of appellant's orthopedic physician, the evidence confirmed the above and further disclosed that appellee had, even before the accident, many degenerative conditions because of his age. This was not refuted in any of the evidence. Both orthopedic physicians testified, and therefore established medically, that appellee could have resumed his work as a teacher during November or December, 1954. This was about 6 months after the accident. Appellee's orthopedic physician testified that the shock which appellee received from the accident was of a duration of only the day of the accident. Appellee's internist, in testifying about the duodenal ulcer did not establish that the ulcer resulted from the accident or that it had any causal relationship to the ulcer. This internist testified that he did not know what caused the ulcer but presumed from the history given him by the appellee that the ulcer was caused by stress and strain or emotions on the part of the appellee. The jury should not have held that the duodenal ulcer resulted from the accident or that expenses and pain and suffering attributable to it were caused by the accident, for in thus holding, again the jury engaged in passion, emotions and prejudice.

e. Use Of Remittitur

The authorities cited herein dictate that a trial court should not use a remittitur when a verdict is excessive, unconscionable and the

result of passion, emotions and prejudice, and that under such circumstances it is the duty of an Appellate Court to set aside the verdict and grant a new trial.

2. After authorizing and instructing counsel for appellee as to his use of the blackboard in his summation to the jury, the trial court should not have, over objection of counsel for appellants, permitted counsel for appellee to use the blackboard beyond such instructions.

Portions of the transcript of the proceedings set forth herein disclose that although the trial court permitted counsel for appellee to use the blackboard in his summation, the trial court specifically instructed counsel for appellee as to the extent he could use the blackboard. The transcript of the proceedings further discloses that during counsel for appellee's use of the blackboard counsel for appellants objected to such use when counsel for appellee went without his authority at the blackboard. Nevertheless, the trial court did not sustain such objections and thus permitted full use of the blackboard, beyond the instructions which had been given counsel for appellee. This was disastrous to appellant's case because it appears obvious that the jury completely accepted the total of \$19,300.00 displayed on the blackboard by counsel for appellee, and added to it an attorney's fee to the total result of a grossly excessive, unconscionable verdict of \$25,000.00.

a. The items which should have been exhibited on the blackboard in accordance with instructions of the trial court were:

Bill of Georgetown Hospital	\$420.70
Bill of Dr. Rush, Appellee's Orthopedic Physician	325.00
Cost of suit of clothes	80.00
Cost of Eyeglasses	35.00
	\$860.70

Surely the \$140.00 claimed for taxi fares should not have been displayed on the blackboard as this was speculative because appellee's witness had testified that she and her husband had transported him in their automobile on numerous occasions. Even though the cost of the suit and eyeglasses were exhibited on the blackboard, the jury should not have awarded full value for these items, or for the taxicab fares.

b. Items Displayed on the Blackboard Beyond the
Scope of Instructions By the Trial Court.

The trial court should not have permitted counsel for appellee to exceed his authority, and the instructions of the court, in placing the following items on the blackboard as the effect on the jury was monumental and directly contributed to the jury engaging in the wildest of speculation and imagination:

\$1,000 for claimed loss from the summer job

\$4,500 for loss from a claimed teaching position for the
academic year 1954-5 (\$4,500 made up of \$3,400 plus
\$1,000 for summer school)

\$2,000 for 6 years, involving future employment until appellee is
70 making grand total of \$29,300, which was corrected at request of
counsel for appellants to \$19,300.

None of these amounts were established by the evidence. All of these amounts were speculative and imaginary. There was no evidence that appellee could have gotten employment from a time before the accident until he got employment in January, 1956. The evidence did establish that although appellee had advertised for employment in a magazine of national circulation and had corresponded and personally contacted in excess of 72 colleges, universities and organizations, he just could not and did not get employment, accident or no accident. The accident did not result in loss of employment because the evidence disclosed that appellee could have again engaged in the work of teaching as early as November or December of 1954 and appellee testified that he did not

mention his physical injuries in any of his correspondence or personal contacts seeking a position.

However, the jury did disregard the evidence, and engaged in passion, emotions and prejudice and awarded appellee all of the damages displayed on the blackboard, and more. This was a direct result of unauthorized use of the blackboard, to complete prejudice against appellants.

3. The trial court did not handle the jury properly in instructing that it would have to return on the case on a Saturday morning, December 1, 1956.

The portion of the transcript set forth herein pertaining to this item discloses that the trial court called the jury back into the court room at 6:00 p. m., November 30, 1956, and upon then ascertaining that the jury had not arrived at a verdict the trial court instructed the jury that it could have another thirty minutes or until 6:30 p. m. to further consider the case, but that if there was no verdict by that time the jury would be excused and required to report back on the case the next morning, Saturday, December 1, 1956. When thus informed the foreman of the jury indicated that he thought further deliberation until 6:30 p. m. on that Friday evening would be worth trying. At 6:30 p. m., the jury returned to the court room and rendered its verdict. It is earnestly and most respectfully submitted that the trial court erred in thus handling the jury. This was not a criminal case. The trial court could have excused the jury until the next Monday morning. It is common knowledge that Saturdays are prevalently non working days in this City where there is predominantly Government employment. Because of this, individuals either have plans for the use of Saturdays, or have made commitments, or in many instances intend to be out of town. There appears no doubt but that the jury, faced with the instruction that if it did not arrive at a verdict by 6:30 p. m., it would have to report again on the case on Saturday, December 1, 1956, became careless, and hurriedly and improperly arrived at a grossly excessive and unconscionable verdict.

It is respectfully requested that the judgment appealed from be reversed and the case be remanded for a complete new trial because the verdict was grossly excessive, unconscionable, contrary to the evidence, and a remittitur should not have been used, and the trial court erred in permitting counsel for appellee to thus use the black-board, and the trial court further erred in the handling of the jury.

ARGUMENT

I.

The Verdict of \$25,000 was Grossly Excessive and Unconscionable, and Should Have Shocked the Conscience of the Trial Court Beyond The Use of a Remittitur And to Such an Extent That a Complete New Trial Should Have Been Awarded and, in Addition, The Verdict Was Contrary to the Evidence.

A. Loss of Earnings

Appellee testified with reference to his educational background and previous employment, in substance, as follows: Graduated from Yale University in 1914; his first position thereafter was as teacher of Mathematics and English at Portland Academy, Portland, Oregon, for a period of three years; he thereafter served two years in the Navy; he then became employed in the advertising business for about 25 years, holding positions with various organizations until he became account executive with one concern and publicity and public relations man with another concern; he was employed as an advertising man by Guaranty Trust Company of New York from 1929 to 1945 with a salary from \$5,000 to \$7,000 per annum with bonus; thereafter he obtained a teaching position at Kent State University teaching Advertising, Marketing and Marketing Research with a starting salary of \$4800 per year; when he

left Kent University he was making \$5600 per year and his salary at Kent University included teaching in summer school; he left Kent University to take a position at American University, Washington, D.C. in September, 1953, and he was with American University until June, 1954 when the accident occurred (Joint App. 12-14).

Appellee's contract with American University disclosed that he was engaged by that University as an Assistant Professor of Advertising at a salary of \$3450 for service during the fall and spring sessions, 1953-1954 for a period September 15, 1953 to June 30, 1954, and such appointment became effective as of September 15, 1953, (Joint App. 29).

In a portion of appellee's deposition, which was used in evidence, he testified that as early as March in 1954 he had told American University that he was not going to teach there in September, 1954 (Joint App. 30). With reference to appellee's claim for loss of earnings from teaching in summer school at American University, he testified that he did not have any definite commitment that he could get classes in the summer school of American University during the year 1954 nor did he know how much he would be paid for summer school employment (Joint App. 36-37).

Appellee claimed that the accident prevented him from getting employment thereafter until early in the year 1956. As evidence to establish this claim, he stated that he placed an advertisement in the American Association of University Professors Bulletin seeking employment (Joint App. 38), and corresponded with and made calls upon in excess of 72 colleges, universities and organizations, both in this country and in foreign countries seeking employment (Joint App. 39-40) and that he had made such inquiries for employment before and after the accident (Joint App. 32). Attention is invited to

appellant's Exhibit No. 2 wherein it is disclosed that appellee started corresponding in seeking a position as early as March, 1954, and also appellee's testimony that he had written such letters as early as that date (Joint App. 32, 41-42). The accident occurred June 8, 1954. Appellee further testified that as early as March, 1954 he had corresponded with Texas University at Austin seeking a position (Joint App. 20) and that he had informed American University as early as March 1954 that he was thinking of getting a position elsewhere (Joint App. 30). The fact that appellee was seeking to leave American University in 1954 was confirmed by Dr. Bentley of American University (Joint App. 77). With reference to Texas University at Austin, attention is invited to Appellant's Exhibit No. 3 wherein is disclosed that Texas University had filled a vacancy there with a local individual of choice. For convenience this exhibit is set forth herein:

AGRICULTURE AND MECHANICS COLLEGE OF
TEXAS
College Station, Texas

June 25, 1954

Department of
Business Administration

Mr. Richard B. Christie
3130 Wisconsin Avenue, N.W.
Washington, D.C.

Dear Mr. Christie:

Please excuse the delay in answering your letter of April 10. Your application was still under consideration, and I wanted to reach a final decision with respect to the appointment before writing you.

We have made an offer to a man in this area which has been accepted. Although we have no vacancy now, I shall keep you in mind if a vacancy develops in the near future.

Sincerely,

T. W. Leland
Head

TWL:dc

Despite this, appellee testified that although he did not have anything definite from any college or university at the time of the accident, he thought he might get a position with Texas University at Austin because he had a friend who taught there who thought that University might employ him (Joint App. 33). Although appellee claimed that the injuries resulting from the accident prevented him from getting employment after expiration of his contract with American University, he testified that he did not mention any physical disability on his part in any of his correspondence seeking employment (Joint App. 33) and he further testified that he would have been foolish to mention the accident or any physical disability in such correspondence because he wanted a job (Joint App. 36). It is apparent therefore that when he corresponded for positions, after the accident, he could have, and was willing, to work then. As aforementioned, appellee testified that despite the accident and resulting hospitalization he continued his correspondence in seeking a position during the last week he was in the hospital (Joint App. 21) and during the one and one-half months after leaving the hospital, when he was having difficulty in getting around (Joint App. 42). His own orthopedist, Dr. Rush, testified that appellee could have resumed his work of lecturing during November or December, 1954 (Joint App. 51), and appellee confirmed this. (Joint App. 34). This was five to six months after the accident.

Dr. Bentley, Dean Emeritus of American University, one of appellee's witnesses, testified that: one of the duties of his office, when appellee was teaching at American University, was to interview applicants for positions (Joint App. 77); he knew that appellee, while he was at American University, was seeking a position elsewhere (Joint App. 77).

In further testimony, Dr. Rush, appellee's Doctor, could not give any percentage of disability on the part of appellee as a result of the accident (Joint App. 49-50) and stated that appellee suffered

mild shock from the accident from which he recovered during the day of the accident (Joint App. 51).

Accordingly, it is respectfully submitted that the evidence in appellee's case, hereinbefore referred to, established that: appellee received only a bachelor's degree at Yale University; thereafter he was principally employed as an advertising man with the exception of one position as account executive and another position as publicity and Public Relations man; his experience and employment as a teacher consisted of three appointments only, namely as teacher of Mathematics and English at Portland Academy for a period of three years, his teaching position at Kent University on the subjects of Advertising, Marketing and Marketing Research and his teaching position at American University for one school year; during March of 1954; because of his dissatisfaction with his position at American University, he started to correspond with at least seventy two colleges, universities and organizations in the United States and in foreign countries, seeking a position; he started such correspondence before the date of the accident which was June 8, 1954 and continued it after the accident; and that he intended to leave American University, as early as March, 1954, or at least during 1954, as evidenced by his testimony and that of Dr. Bentley of American University. In addition, there was no evidence upon which the jury should have held that he was entitled to damages for loss of employment in the summer school of American University during the summer of 1954 because his testimony and that of Dr. Bentley did not disclose that there was any commitment for his teaching summer school at American University nor was there any evidence of any kind as to the amount he would have earned from such summer school employment if he had gotten a commitment thereon. Indeed the record does not contain any evidence of there having been any classes in his subjects at American University during the summer of 1954. In view of all of

the correspondence of appellee to some 72 colleges, universities and organizations, and personal calls upon some of them, and appellant's Exhibit No. 3 wherein was contained a letter from Texas University at Austin stating that the position appellee presumed he might get was filled by a local individual of that University's choice, it is earnestly submitted that appellee just could not and did not get a position until the early part of 1956, because of his having only a Bachelor's Degree, and because of his advanced age of 62 years. Accident or no accident, appellee could not, and did not get a position because the colleges, universities, and organizations contacted did not look upon his applications favorably.

It is respectfully submitted, that the accident and the resulting injuries did not prevent appellee from getting a position, especially in view of the fact that he did not mention the accident and injuries in any of his correspondence seeking a position.

The jury, therefore, had no basis in the evidence for awarding appellee loss of employment concerning summer school at American University or any other losses of employment, because of his inability to obtain a position after the accident. In awarding appellee damages of \$1,000 for loss of summer employment in 1954, \$4500 because of appellee not getting a teaching job for the school year 1954-1955 and subsequent losses of \$2,000.00 per year (the difference between his earnings in Florida in 1956 at the rate of \$2500 per annum and a claimed teaching salary of \$4500 per annum, which claimed teaching salary included \$1,000 for summer school teaching, none of which was ever substantiated) for six years, and on into the future of until appellee is 70 years of age (Joint App. 81-82), the jury engaged in passion, sympathy and prejudice beyond question in awarding these damages, especially in view of the fact that there was no foundation in the evidence

for such damages. This attitude on the part of the jury resulted in its verdict being grossly excessive, unconscionable, and completely contrary to the evidence, to such extent that the verdict should have shocked the conscience of the Trial Court beyond the use of a remittitur and to such an extent that a complete new trial should have been awarded.

With reference to excessiveness of verdicts and awarding of new trials, attention of the Court is invited to the following authorities:

In Virginia Ry. Co. v. Armentrout (4 Cir. 1948), 166 F. 2d 400 involving a case where there were three trials, the jury failed to agree on a verdict in the first trial, a verdict in the sum of \$100,000.00 was returned in the second trial, which was set aside, and a new trial was awarded, and in the third trial the jury awarded a verdict of \$160,000.00, for personal injuries to a minor caused by a train of Virginia Ry. Co., Judge Parker stated the following in granting still another new trial:

At page 407:

"(10-12) And quite apart from the error in the charge, we think the trial judge erred in refusing to set aside the verdict as excessive and grant a new trial. Ordinarily, of course, the amount of damages is for the jury, and whether a verdict should be set aside as excessive is a matter resting in the discretion of the trial judge. This, however, is not an arbitrary but a sound discretion, to be exercised in the light of the record in the case and within the limits prescribed by reason and experience; and where a verdict is so excessive that it cannot be justified by anything in the record or of which the court can take judicial notice, it is the duty of the judge to set it aside. Failure to do so is an abuse of discretion, analogous to error of law, and as such reviewable on appeal."

At page 408:

"(16) The power and duty of the trial judge to set aside the verdict under such circumstances is well established, the exercise of the power being regarded as not in derogation of the right of trial by jury but one of the historic safeguards of that right. Smith v. Times Pub. Co., 178 Pa. 481, 36 A. 296, 35 L.R.A. 819; Bright v. Eynon, 1 Burr. 390; Mellin v. Taylor, 3 B.N.C. 109, 132 Eng. Reports 351.

The matter was well put by Mr. Justice Mitchell, speaking for the Supreme Court of Pennsylvania in *Smith v. Times Pub. Co.*, supra, 178 Pa. 481, 36 A. 298, as follows:

'The authority of the common pleas in the control and revision of excessive verdicts through the means of new trials was firmly settled in England before the foundation of this colony, and has always existed here without challenge under any of our constitutions. It is a power to examine the whole case on the law and the evidence, with a view to securing a result, not merely legal, but also not manifestly against justice, -- a power exercised in pursuance of a sound judicial discretion, without which the jury system would be a capricious and intolerable tyranny, which no people could long endure. This court has had occasion more than once recently to say that it was a power the courts ought to exercise unflinchingly.' Italics Supplied by Court.

"To the federal trial judge, the law gives ample power to see that justice is done in causes pending before him; and the responsibility attendant upon such power is his in full measure. While according due respect to the findings of the jury, he should not hesitate to set aside their verdict and grant a new trial in any case where the ends of justice so require. *Aetna Casualty & Surety Co. v. Yeatts*, 4 Cir., 122 F. 2d 350.

"(17) The power of this court to reverse the trial court for failure to exercise the power, where such failure, as here, amounts to an abuse of discretion, is likewise clear. It is true that under section 22 of the Judiciary Act of 1789, 28 U.S.C. A. Sec. 879, there may be no reversal on writ of error for any error in fact; and this rule has been frequently applied where reversal is sought because damages are excessive or inadequate. *Fairmont Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474, 53 S.Ct. 252, 77 L. Ed. 439. We do not understand the rule to have application, however, in those exceptional circumstances where the verdict is so manifestly without support in the evidence that failure to set it aside amounts to an abuse of discretion. In a situation of that sort, reversal is no more based on 'error in fact'

than reversal for refusal to direct a verdict for insufficiency of evidence. Whether there has been an abuse of discretion is a question of law in the one case, just as in the legal sufficiency of the evidence in the other. An appellate court is not required to place the seal of its approval upon a judgment vitiated by an abuse of discretion.

"That refusal to set aside a verdict which is grossly excessive constitutes an abuse of discretion reviewable on appeal is held directly in *Cobb v. Lepisto*, 9 Cir., 6 F. 2d 128, 129; *W. T. Rawleigh Co. v. Shoultz*, 3 Cir., 56 F. 2d 148; *Department of Water & Power v. Anderson*, 9 Cir., 95 F. 2d 577, 586; *Pettingill v. Fuller*, 2 Cir., 107 F. 2d 933, 936. In the case last cited Judge Augustus Hand, speaking for a court composed of himself, Judge Learned Hand and Judge Clark, stated the rule applicable as follows:

'In spite of the fact that the courts of the United States have been most loath to review orders granting or denying motions to set aside verdicts, it is implicit in the opinion of Justice Brandeis in *Fairmont Glass Works v. Cub Fork Co.*, 287 U.S. 474, 483-486, 53 S. Ct. 252, 77 L. Ed. 439, that they may do so in certain cases, one of which would seem to be an abuse of the trial judge's discretion. 287 U.S. at p. 485, 53 S. Ct. 252, 77 L. Ed. 439. There a review was declined because there was no explanation by the trial judge of his refusal to set the verdict aside and the record did not show that the verdict was clearly erroneous and arbitrary. ***That such an order may be reviewed on an appeal from a final judgment is undoubted unless the exercise of judicial discretion involved in making it is beyond the correcting hand of a court of appeal, no matter how arbitrary it was. We think that Justice Brandeis in *Fairmount Glass Works v. Cub Fork Co.*, 287 U.S. 474, 485, 53 S. Ct. 252, 77 L. Ed. 439, evidently regarded such orders as reviewable. Indeed, the dissenting Justices (Stone and Cardozo, JJ.) held that the court of appeals properly reviewed and reversed an order granting a new trial where the trial court had abused its discretion in refusing to set aside a verdict for nominal damages rendered by a jury in plain disregard of the evidence.'

"(18) That abuse of discretion in refusing to set aside a verdict is an exception to the rule that the granting or refusing of a new trial is not assignable as error, is definitely recognized in the following decisions: *Detroit Transfer Co. v. Pratt*, 6 Cir., 2 F. 2d 193; *Carter Coal Co. v. Nelson*, 4 Cir., 91 F. 2d 651, 654; *Western Union Tel. Co. v. Dismang*, 10 Cir., 106 F. 2d 362, 364; *Southern Fruit Distributors v. Fulmer*, 4 Cir., 107 F. 2d 456, 459. In the case of *Carter Coal Co. v. Nelson*, *supra* (91 F. 2d 654), this court, speaking through Judge Soper, said:

'The established rule in the federal appellate courts is that they have no power to review the action of a trial court in granting or denying a motion for a new trial for error of fact. Such a matter lies wholly within the discretion of the trial court and it is only when there is an abuse of such discretion that its action is reviewable.' *Italics supplied by Court.*

"The matter is fully discussed with annotations in 2 Am. Jur. 907, 911, where, after saying that 'the granting or refusing of a motion for a new trial, filed after a general verdict, is largely a matter of discretion, and that the action of the court in this respect is only reviewable for an abuse thereof', the rule is stated that 'the discretion of the court in granting a new trial in the above cases is not absolute, and the appellate courts have not hesitated, where an abuse of discretion has been shown, to reverse the action of the lower court'. And in one of the cases cited, reference is made to the rule of manifest wisdom that 'a court of review will more reluctantly interfere with the action of the trial court in granting a new trial than in refusing one'. *Strode v. Strode*, 194 Ky. 665, 240 S.W. 368, 370, 27 A.L.R. 313.

"For the reasons stated, the judgment appealed from will be reversed and the cause will be remanded for a new trial."

"Reversed and remanded."

In *Day v. Union Pacific R. Co.* (Mo. 1955) 276 S.W. 2d. 212, involving an action for personal injuries and property damages allegedly caused by defendant Railroad, the jury returned a verdict for the plaintiff

in the amount of \$25,000. Defendants motion for a new trial was granted on the ground that the verdict was so excessive as to indicate bias, passion and prejudice on the part of the jury. Upon appeal the action of the trial court in awarding the new trial was affirmed. In this case we have a somewhat similar factual situation on damages. Plaintiff's medical expenses were \$100 - \$150; evidence disclosed no broken bones and plaintiff was not rendered unconscious by the collision; medical examination showed bruises on the back, left hip, right side, and muscle spasm in the back. At the time of trial, plaintiff still had a spastic condition and a disc injury could have resulted from the condition which would result in temporary disability for about three months and thereafter 15% permanent disability. Plaintiff was 49 years of age at the time of trial and his average earnings were \$100 per week. In request for instructions, counsel for plaintiff did not ask for damages for either the property damages or future medical expenses as there was no evidence as to the latter. The court observed that the jury must have allowed at least \$24,850 of the \$25,000 verdict for other elements submitted by the plaintiff, namely pain and suffering, pain and suffering in the future, reasonable compensation for injuries and disabilities, and loss of earnings he had sustained and would sustain in the future. The court further observed that there was substantial evidence from which the trial court could have reasonably found that plaintiff's spinal condition at the time of trial was neither the result of injury sustained in the collision, nor as serious as he claimed and that noting the complete absence of any evidence upon which to base their award for loss of earnings, it held that the trial court did not abuse its discretion, after weighing all the evidence, and found that the \$25,000 verdict was so excessive as to indicate bias and prejudice on the part of the jury. The appellate court further held that a trial court may infer the jury's bias and prejudice solely from the size of the verdict and that a remittitur may not be ordered where the verdict resulted from the jury's bias and prejudice.

Cf. Keeter v. Devoe & Reynolds, (1936) 338 Mo. 978; 93 S.W. 2d 677; Ona v. Reachi (Cal. 1951) 233 P. 2d. 949.

In addition, in Keeter v. Devoe and Reynolds (Mo. 1936) 338 Mo. 978, 93 S.W. 2d. 677, referred to in the Day case supra, the trial court was held not to have abused its discretion in granting a new trial on the ground that a verdict of \$25,000 was excessive for injuries which included; fractures of the tibia and fibula; permanent leg weakening necessitating use of crutches for one year; dislocation of an ankle; fracture of the arm bone; and considerable pain and suffering.

b. Medical Expenses, Damage to Suit and Glasses

Appellee introduced in evidence the following damages as to medical expenses; The Georgetown University Hospital bill in the amount of \$420.70 (Appellee's Exhibit No. 5); the bill of his orthopedic physician, Dr. Rush, in the amount of \$325.00 (Joint App. 47); damage to his suit which he claimed cost him about \$80.00 (Joint App. 28); damage to his eyeglasses which he claimed cost him \$35.00 (Joint App. 28). It is further respectfully submitted that these are the only expenses that could be attributable to the accident. Furthermore, and although the hospital and Doctor's bill in the District of Columbia, only, could be definitely attributable to the accident, appellee was not entitled to full purchase price of the suit and glasses as the suit had been used and there was no testimony that the glasses were broken. As to taxi fares appellee claimed he had to expend during the month and a half after he was released from the hospital, counsel for appellee argued to the jury and placed on a blackboard \$140 for this item (Joint App. 81), which at best could have been based on appellee's testimony that he expended about \$3.00 a day for cabs for a month and half. (Joint App. 20). However, appellee's witness Mrs. MacDonald testified that during that period she and her husband carried appellee around numerous times in their automobile (Joint App. 76). The jury should have considered this service of the

the MacDonalds in mitigation of claimed cab expenses. However, the jury in further expression of sympathy and emotions for appellee allowed him all of these items to a full value of \$1000 (Joint App. 81). Although the amounts involved are relatively small, it is further respectfully submitted that full value should not have been allowed for the suit of clothes, eyeglasses and taxi fares.

c. Claimed Expenses Resulting From Duodenal Ulcer.

According to the testimony of Dr. Sullivan, local internist, he first saw and examined appellee just before the trial (Joint App. 54); historically the injury to the leg did not cause the ulcer (Joint App. 60-61, 68); when he examined him he could not tell whether the ulcer was bleeding (Joint App. 62); and at the time of his examination appellee's blood count was just below normal (Joint App. 62). Upon questioning of Dr. Sullivan by the trial court he stated that he took his history of the case from appellee (Joint App. 54, 61); he did not know what caused the ulcer but he inferred from the history given to him by appellee that it was caused by financial worry (Joint App. 69); if appellee's financial worries were removed or he had any type of security, it would be a big boon towards helping him get better or improve (Joint App. 69); in taking appellee's history, appellee did not tell him that he was gainfully employed from the first of the year (1956) until he went into the hospital in Florida, and he, Dr. Sullivan, did not ask appellee about that (Joint App. 70). Dr. Sullivan further testified that if appellee felt secure in his employment in Florida it would probably mean that there might have been other factors at work in the production of the ulcer in connection with stress and strain not only financial difficulties (Joint App. 70). In view of this testimony, which it is respectfully submitted established that the accident did not cause or have any causal relation to the duodenal ulcer, and because most certainly the accident did not cause any loss of employment, the jury should not have allowed

appellee any amount such as \$600 for hospital expenses in Florida in connection with the duodenal ulcer (Joint App. 26), or even \$578 as presented to the jury by counsel for appellee (Joint App. 82), or \$177 for the bill to his physician in Florida (Joint App. 26-27), or \$50 to Dr. Sullivan (Joint App. 65). The Trial Court permitted these items of damages to be placed on the blackboard in counsel for appellee's summation to the jury after counsel for appellants had secured from the Trial Court an instruction to counsel for appellee that he should not place any figures on the blackboard which were imaginary or without foundation in the evidence (Joint App. 79, 80). Most certainly, the expenses claimed to be attributable to the duodenal ulcer, according to the testimony of appellee's internist, had no causal or other relation to the injury to the leg resulting from the accident, in any way.

d. Entire Medical Aspect

Upon questioning by the Trial Court, appellee's orthopedic physician, Dr. Rush, testified that during his initial examination of appellee, immediately following the accident, he found the following conditions: no fractures of either leg; no damage to the bone structure; no damage to the supporting ligaments of the joints above or below the involved area nor were they torn or crushed but that there was damage to all the soft tissues.

Dr. Rush's opinion upon his last examination of appellee just before trial was that there was lack of circulation in the area of the wound (ulcer of the leg), based upon his conclusion that the wound had not healed as rapidly as he expected. (Joint App. 52-53).

As aforementioned, appellee's internist testified that historically there was no relation between the accident and the duodenal ulcer.

As to kyphosis (rounding of the back), appellee's physician Dr. Rush, testified that he noticed that condition in appellee at the

time of the first examination and appellee's back, was very much the same at times of trial (Joint App. 49), and, Dr. Gordon, orthopedic physician who testified for appellants stated there was no increase in kyphosis as a result of the accident because this condition is found frequently in older people (Joint App. 74).

Dr. Gordon, in further testifying for appellants, stated that upon his first examination of appellee during May, 1955, it was noted that he walked with a halting type of gait, with a very stooped posture, which he, appellee, stated had been present for many years, that is, he was bent over in a sort of hunched position as he had a marked kyphosis deformity; x-rays of his left leg and ankle were entirely negative as they had been on admission to the hospital; there was a thickening of the right ankle probably due to an old fracture not related to the present injury; examination of his leg showed a small ulcer on his left leg which was 1 1/2" x. 1 1/2" in size; he had numerous superficial varicose veins of both feet and legs; and there was impeded circulation which had been present for many years, probably due to the varicose veins (Joint App. 71). Dr. Gordon further testified that during this initial examination he came to the following diagnosis: contusions of both lower extremities with an ulcer, chronic, moderate, of the left leg; secondary trauma, superimposed upon circulatory insufficiency (Joint App. 72). Dr. Gordon further testified that there were other diagnosis during this initial examination, which were many, consisting of benign prostatic hypertrophy (enlarged prostate, quite common in older people) chronic bronchiectasis of the chest; hypertension or high blood pressure due to arteriosclerosis or hardening of the arteries, and severe hypertrophic arthritis with subluxation, that is partial dislocation of the cervical spine which was old (Joint App. 72). Dr. Gordon further testified that he felt that the injuries which appellee sustained directly from the accident of 1954 were those of his legs, and

the right leg at that time had healed and he was having difficulty only with the left leg at that time; the chronic ulcer of the left leg had persisted because of poor circulation; appellee would have a partial disability of the left leg as a result of the chronic ulcer but inasmuch as appellee was a professor or teacher, not a laborer, it would be insufficient to interfere with his type of occupation; and it was obvious that a great deal of appellee's difficulty stemmed from pre-existing deformities of the upper back and neck with rather advanced degenerative changes due to his age (Joint App. 72-73).

Dr. Gordon further testified with reference to his second examination of appellee during November, 1956, just before the trial, that at that time appellee was obviously improved; an examination of his left leg showed no drainage from the previous ulcer area as it was covered with scaly type of skin and there was no drainage underneath it nor was there any open area, and appellee stated that it had been healed for a short time; appellee thought he was getting more round shouldered and stooping over more but he, Dr. Gordon, couldn't disclose that by his examination, and further that as people get older this condition is frequently found (Joint App. 73-74).

From the above it was clearly apparent that appellee at the time of the accident in June 1954 had many conditions which were degenerative, that is merely because of his age and previous physical condition; the injuries sustained as a result of the accident consisted only of contusions of both legs with a rather insignificant ulceration on his left leg and there were no broken bones or torn ligaments. Furthermore, it was obvious from the testimony of the orthopedic physicians on both sides of the case that the injuries sustained by the appellee at the time of the accident would not have prevented him from again engaging in his employment as an instructor, as early as November or December 1954 (Joint App. 51, 73).

e. Use of Remittitur

After hearing on appellants motion to vacate and set aside the verdict and judgment for appellee and for directed verdict under Rule 50 of the Federal Rules of Civil Procedure and/or for a new trial, the Trial Court issued its order denying the motion under Rule 50 and further provided,

"and it is further ordered that if, within ten days from this date, plaintiff shall file a remittitur of that part of the verdict and judgment in excess of \$17,500 the motion for a new trial will be denied as of the date of the filing of said remittitur; otherwise, said motion will be granted" (Joint App. 9, 10).

Attention of the court is invited to Minneapolis, Saint Paul and S.S.M. Ry. Company v. Moquin, 283 U.S. 520, 51 S. Ct. 501, 75 L. Ed. 1243, decided May 18, 1931, a recognized basis authority condemning the use of a remittitur in denying a motion for a new trial, wherein was involved an excessive verdict because of the exercise of passion and prejudice on the part of the plaintiffs counsel. Mr. Justice Roberts in delivering the opinion of the Court stated, with reference to the use of a remittitur:

"It is unnecessary to cite from the record what occurred at the trial, or to discuss the propriety of the views of the court below as to the basis of the verdict. The finding is quoted above, and our sole concern is as to the action it requires. Nor need we inquire into the rules applicable in trials under state law. Whether under the state's jurisprudence the present record would entitle petitioner to a new trial or to such a conditional order as was awarded is immaterial.

In actions under the federal statute no verdict can be permitted to stand which is found to be in any degree the result of appeals to passion and prejudice. Obviously such means may be quite as effective to beget a wholly wrong verdict as to produce an excessive one. A litigant gaining a verdict thereby will not be

permitted the benefit of calculation, which can be little better than speculation, as to the extent of the wrong inflicted upon his opponent.

The judgment is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed."

And to the following authorities, citing and following the Minneapolis case supra:

✓ National Surety Company v. Jean (6 Cir. 1932) 61 F. 2d 197, involving a verdict in an amount of \$25,000, in which the trial court denied a motion for a new trial upon the plaintiff filing a remittitur in the amount of \$5,000 the court held:

At page 198:

"This was a definite, though indirect, holding that the verdict was excessive, and, although the memorandum contains no specific statement to that effect, we infer that the court ascribed the error to passion, prejudice, or caprice as these were the only causes urged as a basis for its action or mentioned in the memorandum. Indeed, an examination of the record discloses no other reasonable explanation for the holding. The suggested remittitur was accepted, judgment for \$20,000 was entered, and the motion for a new trial was overruled. Appellant excepted and assigned error.

"(1, 2) The granting or denial of the motion was in the sound discretion of the trial court, and is not reviewable except for a clear abuse of discretion [*Hines v. Smith*, 270 F. 132, 141 (C.C.A. 6); *Parker v. Elgin*, 5 F. (2d) 562, 564 (C.C.A. 6); *Kos v. Baltimore & Ohio R. R. Co.*, 28 F. (2d) 872 (C.C.A. 6); *Detroit United Ry. v. Craven*, 13 F. (2d) 352, 354 (C.C.A. 6)], but we do not find it necessary to determine whether there was such abuse in the present case since the trial court itself evidently found that the excessive verdict was the result of passion, prejudice, or caprice. Our question is whether after such finding the trial court may correct the mistake by the suggestion and acceptance of a remittitur, and the answer is that it could not. See

Minneapolis, St. Paul & Sault Ste. Marie Ry. Co. v. Moquin, 283 U.S. 520, 51 S. Ct. 501, 75 L. Ed. 1243; Schendel v. Bradford, 106 Ohio St. 387, 394, 395, 140 N.E. 155. The remedy is a new trial.

"The judgment is therefore reversed."

In Brabham v. State of Mississippi (5 Cir. 1938) 96 F. 2d 210, involving the denial of a motion for new trial upon plaintiff filing a remittitur in the amount of \$5,000 to a verdict of \$15,000, the appellate court reversed and remanded with directions, holding:

At page 213;

"(9, 10) * * * Verdicts made excessive by the passion and prejudice springing from indulgence, in the jury room, in such feelings, may not be cured by a remittitur, but only by a new trial. National Surety Co. v. Jean, 6 Cir. 61 F. 2d 197, Minneapolis, St. P. & S.S.M.R. Co. v. Moquin, 283 U.S. 520, 51 S. Ct. 501, 75 L. Ed. 1243; Fairmount Glass Works v. Coal Co., 287 U.S. 474, 485, 53 S. Ct. 252, 77 L. Ed. 439; c/f F. W. Woolworth Co. v. Wilson, 5 Cir., 74 F. 2d 439, 98 A.L.R. 681; On the general question of power over verdict, c/f Dimick v. Shiedt, 293 U.S. 474, 55 S. Ct. 296, 79 L. Ed. 603, 95 A.L.R. 1150."

In Southern Pac. Co. v. Guthrie (9 Cir. 1949-50) 180 F. 2d 295, although it was held that there was no abuse of discretion in refusing to grant a new trial, the following was held to be generally agreed upon where the verdict is the result of passion or prejudice:

At page 304:

"(9) It appears to be generally agreed that when it can be said that the verdict of the jury was the result of passion or prejudice, it is the duty of the appellate court to set aside the verdict and grant a new trial. Southern Pac. Co. v. Zehnle, 9 Cir., 163 F. 2d 453; L. E. Whitham Const. Co. v. Remer, 10 Cir., 105 F. 2d 371; American Ice Co. v. Moorehead, 62 App. D.C. 266, 66 F. 2d 792. In such a case a new trial must be ordered, -- the error cannot be cured by a remittitur. Minneapolis, St. P. & S.S.M. Ry. Co. v. Moquin, 283 U.S. 520, 51 S.Ct. 501, 75 L.Ed. 1243."

And in Fornwalt v. Reading Co. (U. S. D. C. Pa. 1948) 79 F. Supp. 921, the court stated the following with reference to the use of a remittitur in denying a motion for a new trial:

At page 924;

"(11, 12) Attention is called to the language in Smith v. Pittsburgh, etc., supra, 90 F. at page 787, and to that of Mr. Justice Harlan in Arkansas Valley, etc. v. Mann, supra, 130 U.S. at pages 74, 75, 76, 9 S. Ct. at pages 459, 460 as well as to 15 Am. Jur., Id., Section 204, p. 620, and section 205, p. 623, and see 3 Moore's Federal Practice, Section 59.02, p. 3243, as to the distinction between remitting in a case where excess is the only infirmity of the verdict and granting a new trial where the jury was either governed by passion or had deliberately disregarded the instructions of the court or the facts that made for the defendant. In either of the latter cases, the court should grant a new trial. In fact, in Minneapolis, St. Paul & Sault Ste. Marie Ry. Co. v. Moquin, 1931, 283 U.S. 520, 521, 51 S. Ct. 501, 75 L. Ed. 1243, Mr. Justice Roberts for the court held that in actions of this kind if the verdict is in any degree the result of passion or prejudice there can be no remittitur; a new trial must be awarded."

Such authority is definitely applicable to this appeal because the record in this case conclusively discloses a verdict which was the result of passion and sympathy which proved to be grossly prejudicial to the appellants, one of which is a corporation. Thus, the trial court should not have resorted to the use of a remittitur but should have, as indicated in the above cases, ordered a complete new trial.

It is further submitted that a remittitur should not be used where there is no evidence as to amounts upon which it can be based. Without doubt or contradiction, in using a remittitur, a trial court, of necessity, assumes the power of the jury to judge the facts as to damage. In thus invading the province of the jury a single individual, one trial judge,

judges the evidence as to damages in lieu of it being judged by a jury. In a case such as this where there was no evidence to support loss of earnings from summer school or loss of earnings from other employment neither jury nor judge should have formulated an opinion as to damages in the amount of \$25,000 or even \$17,500. If the jury gave the appellee benefit of all damages immediately resulting from the accident, and they were the only damages actually attributable to the accident, the total amount of such damages was \$860.70 and obviously this would not be a basis for a verdict as high as \$25,000 or even \$17,500. It is earnestly submitted that such amount of damage, to which could be added some damages for pain and suffering, should support a verdict not exceeding \$5,000 and that actually, the verdict should not have been as high as \$3500. Accordingly appellants are at a complete loss to understand how the trial court arrived at a figure of \$17,500, as suggested in the remittitur, because neither loss of employment nor the duodenal ulcer could have been attributed to the accident, according to the evidence.

II.

After The Trial Court Instructed Counsel For Appellee Concerning Use of The Blackboard in His Summation, The Trial Court should Not Have, Over Objection of Counsel For Appellants, Permitted Counsel For Appellee To Use of the Blackboard Beyond The Instructions On Such Use; and The Trial Court Abused Its Discretion And Committed Error, in Denying Appellants Motion For A New Trial On This Ground.

Due to the importance of this phase of this appeal, the following excerpts from the transcript of the proceedings are quoted:

Mr. Richardson: Well now, I want to request that counsel for plaintiff be not permitted to use the blackboard, with reference to any figures he has pertaining to damages.

The Court: Oh, I won't stop him if he wants to use it to add up. But of course, as soon as he gets through, you can erase it, and that will be the end of it.

Mr. Richardson: Then, I further request that he be permitted to use the blackboard for figures only to the extent of the figures in evidence.

The Court: Oh, certainly.

Mr. Richardson: And nothing beyond that.

The Court: He can't draw on his imagination.

Mr. Richardson: Thank you.

The Court: All right.

Mr. Walsh: Thank you. I may not draw on my imagination on the blackboard, he means. I may draw on it otherwise? (Laughing)

Thank you, Your Honor.

Mr. Richardson: Thank you.

The Court: You can't draw on your imagination either way." (Joint App. 79, 80)

From the foregoing it is obvious that the trial court, in permitting counsel for appellee to use the blackboard in his summation to the jury, instructed such counsel that he could use the blackboard for figures only to the extent of the figures in evidence, and nothing beyond that, and that he could not draw on his imagination in using the blackboard, or otherwise.

Regardless of this instruction, in his summation to the jury counsel for the appellee used the blackboard beyond authority given to him by the trial court to such extent that he did display on the blackboard items and figures of damages not in evidence, and resorted to his imagination concerning other items and figures not in evidence. The occurrences incident thereto because of their importance in this appeal are quoted from the transcript of the proceedings:

Mr. Walsh: Now, it has been proved -- and this has all been testified. (At blackboard) Georgetown Hospital, 420. (Writing on board) Orthopedic surgeon, Dr. Rush, 325. Taxis after he got off his crutches to be transported, 140. \$80 for the suit that was ruined when the truck went over him. \$35 for the reading glasses which were thrown and scratched and unusable. \$1,000, very clear.

The summer job, the work he couldn't do when he was on his back or on crutches, \$1,000. \$2,000. All testified to.

Mr. Richardson: If Your Honor please, I object to this item, in view of the fact that there is no testimony whatsoever as to how much Professor Christie would have made, had he gotten this summer school job.

The Court: I think he said it would be a thousand dollars.

Mr. Richardson: He did? Then I beg your pardon.

The Court: That is my recollection; but the jury will recall.

Mr. Richardson: That wasn't my recollection.

Mr. Walsh: Now. He did not get the teaching job for the ensuing academic year of 1954-5. \$4500. (Continuing to write on board)

The Court: I thought he said he made \$3400.

Mr. Richardson (Simultaneous with Court): I don't recall that, if your Honor please.

Mr. Walsh: \$3400, if Your Honor please, plus summer school which he testified is the usual thing, that if you get the nine months' job, you get the summer school.

The Court: Very well.

Mr. Richardson: Well, what university was this?

The Court: You may argue that point?

Mr. Walsh: Not on my time, please, Mr. Richardson.

The Court: You may argue.

Mr. Walsh: Now we have got \$6500.

Now, he found himself down in the Winter Park Hospital with a bleeding ulcer. 578. The doctor down there, 177. (Writing on board as before). The ulcer doctor here. (Writing 50 on board) \$805. (Writing \$7305 on board)

All right, now. As a result of all this, ascertaining it has been shown that from that time, his earning capacity has certainly been impaired. He has been making, as he has testified, approximately \$2500. Had he been able to work in his usual capacity, \$4500. So that for the last year, he has lost \$2000, the difference between \$2500 and \$4500.

Now, that is \$9300.

What about the future? There has been testimony by Dr. Sullivan and Dr. Rush that he won't be able to do the type of work for the future. (Underscoring supplied) Well, he is 65. A man of his education and his training should certainly be able to earn \$4500 a year until he is 70. That's five years, at a difference of \$2000. So we will take the 9300 and we will add five years at \$2000 a year: 29,300. (Sic)

Now, pain and suffering, -- I had to drop the crayon.

The Court: Your 40 minutes have now expired. If you want to save 10 minutes for rebuttal, this is the time to do it.

Mr. Walsh: Well, I suggested to Mrs. Burroughs that it was a minute I had. We put it at 12:29.

The Court: All right.

Mr. Walsh: Just one minute.

I just wanted to point out that pain and suffering, I am not putting pain and suffering down there. How much? 21 days in the hospital. How much a day for the days in the hospital, at Georgetown? How much on the crutches and on the cane? How much walking in the streets to the doctors? How much, all those months before going to Florida? How much for the ulcer? How much for the days in the hospital with the bleeding ulcer, when he had blood transfusions? That is pain and suffering. He is entitled to be compensated for it.

But who can say what the value is? That is, who can testify to the value? Who can give evidence?

Nobody. You have got to give a value to it. Because he is entitled to be compensated for all the items that have been enumerated here -- because, of course, you are free to give your own values to them. But all those items, all those elements, plus pain and suffering, from June 8th to today; and for the future, for the future, so long as injuries which caused pain and suffering, and which have been the result of this accident, persist.

Thank you, ladies and gentlemen.

Thank you, Your Honor.

Mr. Richardson: Mr. Walsh, take a minute of my time and correct this computation here, if you will. I don't think that is 29,000.

Mr. Walsh: Oh, I'm sorry. (Correcting figure on board from 29,300 to 19,300).

Mr. Richardson: Thank you. (Joint App. 81-83)

(a) Items established in evidence: as a result of the accident complained of:

It is respectfully submitted that the following items, were the only items established in evidence to have resulted from the accident complained of:

Bill of Georgetown Hospital	\$420.70
Bill of Dr. Rush for treatment of the legs	\$325.00
Cost of suit	\$ 80.00
Cost of glasses	\$ 35.00
Total	\$860.70

Surely, the \$140 for taxi fares should not have been displayed on the blackboard especially because of Mrs. MacDonald's testimony that she and her husband carried appellee around numerous times in their car during the one and one-half month period involved (Joint App. 76).

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Total	\$860.70

Surely, the \$140 for taxi fares should not have been displayed on the blackboard especially because of Mrs. MacDonald's testimony that she and her husband carried appellee around numerous times in their car during the one and one-half month period involved (Joint App. 76).

The full purchase price of \$80.00 for the suit and \$35.00 for the glasses should not have been displayed on the blackboard because both of these items had been used and accordingly appellee was not entitled to full purchase cost of them. Furthermore, appellee testified he was using the same glasses at time of trial (Joint App. 18).

(b) Items Displayed on the Blackboard Which Did not Result from the Accident

The \$1,000 displayed for the claimed loss of the summer job should not have been placed on the blackboard because the only testimony concerning this loss was that appellee had an opportunity to go to Portland, Maine on a personnel job which he claimed would have paid him about \$1000 for a duration, he thought, of two and one-half months, and the man who was going to help him get the job was a Mr. Thayer who had written him about it (Joint App. 23-24) but that he, appellee, had not saved the correspondence because it was personal, and he did not think his counsel would need it (Joint App. 40). Nevertheless, and over objection of counsel for appellants, counsel for appellee displayed the \$1000 figure on the blackboard as a loss attributable to the accident.

Counsel for appellee next exhibited on the blackboard \$4500 as a loss because appellee did not get a teaching job for the academic year 1954-5, observing to the court that the \$4500 item consisted of \$3400 plus summer school. Apparently counsel for appellee meant that \$3400, the normal compensation for the ensuing academic year of 1954-5 at American University, plus \$1,000 for summer school resulted in the total of \$4500 placed on the blackboard. In any event, the trial court permitted the \$4500 to be placed on the blackboard concerning this item after objection of counsel for appellants and in spite of the fact that this amount was purely imaginary, in that the evidence disclosed that although appellee had written to in excess of 72 colleges,

universities, and business organizations, and made personal calls upon some of them, he had not been able to get a position of any kind from the time of the accident until during January, 1956 at American University or at any other place. This error in permitting the \$4500 to be displayed on the blackboard was of monumental importance because thereafter counsel for appellee used that figure and by deducting earnings in the amount of \$2500 per year (the salary that appellee claimed he was getting from his 1956 employment in Florida), projected a claimed loss from earnings into the future and until appellee attains the age of 70 years. Thus, the wildest of imagination and speculation was engaged in by counsel for appellee in placing these figures on the blackboard for he thereby displayed a build up of damage from \$860 which was made up of the Georgetown Hospital bill expense, Dr. Rush's bill, and the full purchase price of the suit and glasses, to a total of \$19,300 which included the hospital bill and doctors bills pertaining to the duodenal ulcer claimed to have resulted from the accident, which is being hereinafter referred to, and the aforementioned claimed loss of employment.

With further reference to the duodenal ulcer and claimed expenses incident thereto, it is respectfully submitted that the testimony of appellee's internist did not establish that the duodenal ulcer resulted from the accident (Joint App. 53-70). To the contrary, Dr. Sullivan, appellee's internist, reported in his medical report and also testified that there was no causal relationship between the accident and the duodenal ulcer (Joint App. 60, 61, 68). Dr. Sullivan testified that had he known appellee had been gainfully employed prior to his examination of him that his thoughts would have been directed toward some other emotional strain other than financial worries, which may have caused the duodenal ulcer (Joint App. 70). Furthermore, although Dr. Sullivan tried to establish through his testimony the cost of hospitalization, hospital treatment and service at Winter Park, Florida, he admitted in

his testimony that he did not have any actual knowledge of such costs, as the costs he had testified to were for such items in a hospital in Miami, Florida (Joint App. 66-67). But, counsel for appellee was permitted by the trial court to display on the blackboard \$578 for hospital expenses at Winter Park, Florida, thus further engaging in imagination; \$177 which appellee testified was Dr. Ramsey's bill in Florida, and \$50.00 which Dr. Sullivan charged. Due to the testimony of Dr. Sullivan to there being no causal relationship between the accident and the duodenal ulcer, it is earnestly and respectfully submitted that these last mentioned items should not have been displayed on the blackboard because the evidence established that they were not connected in any way with the accident.

It will be noted from the transcript of the proceedings that counsel for appellee erroneously added his items displayed the blackboard to a total of \$29,300 but that he corrected this figure to \$19,300 (Joint App. 83). It is respectfully submitted that the unauthorized use of the blackboard resulted in the jury engaging in passion and prejudice to the extent of accepting the unjustifiable figure of \$19,300 exhibited on the blackboard and adding to it an attorney's fee of one-third to the total unjustifiable, unreasonable, and unconscionable sum of its verdict in the amount of \$25,000 of which only \$860.70 had been actually established in evidence, exclusive of pain and suffering, as a result of the accident complained of.

(c) Attention of the Court is further invited to Warren Petroleum Corporation v. Pyeatt, (Texas, 1955), 275 S.W. 2d 216, wherein judgment for the plaintiff was reversed and the case remanded for a new trial because of improper use of the blackboard in displaying charts, containing among other things, items of damages. The Court held:

"Defendants objected to the placing of said charts upon the blackboard and to their use in the closing argument for many reasons, the chief objection being that 'the use of the charts were highly prejudicial and effectively injected new and unsworn testimony for the jury consideration. With this contention we agree. We do not believe the use of such charts would be permissible in any case over timely objection."

III.

The Trial Court Did Not Handle The Jury Properly In Informing The Jury That if a Verdict Was Not Agreed Upon By 6:30 p. m., Friday, November 30, The Jury Would Have To Report Back On The Case on Saturday, December 1, 1956.

Again due to the importance of this portion of the trial, the following extracts from the transcript of the proceedings quoted:

"(At 6:00 p. m., the jury returned to the courtroom and the following proceedings occurred:)

The Court: Who is the foreman?

The Jury Foreman: I am. (Rising to his feet)

The Court: Mr. Foreman, not having heard from you, I assume that the jury has not as yet agreed upon a verdict.

The Jury Foreman: We have agreed on the liability but not on the amount.

The Court: Well, it is now six o'clock, and I assume that -- or rather, I suppose that some of you have engagements for the evening. Be seated, sir. Under those circumstances, I am going to allow you to separate and then return tomorrow morning at ten o'clock and resume your deliberations -- that is, unless you think there is likelihood, Mr. Foreman, of reaching an agreement within a reasonably short time. Do you think there is such a likelihood? Don't state anything except yes or no.

The Jury Foreman: There is a possibility.

The Court: Well, do you think that another half hour might be desirable before I release you for the night?

The Jury Foreman: I think it is worth trying, yes.

The Court: Very well, I will let you deliberate a little further until, say, six-thirty, and then if you don't reach an agreement, I shall take appropriate steps in the matter.

I don't want anyone to give up his views at all because of the time limitation. This case is entitled to your full, fair and complete consideration, even though it has to go over until tomorrow.

(Whereupon, the jury retired once more, to resume its deliberations in the jury room.)

The Court: Well, I will see you at six-thirty.

Mr. Richardson: I beg your pardon?

The Court: I will see you at six thirty. If they don't reach agreement by then, I am going to send them home for the night and let them come back tomorrow morning.

Mr. Richardson: I think they will reach an agreement.

The Court: Well, we shall see what we shall see.

(Whereupon, the Court recessed once more, to await the verdict of the jury.) (Joint App. 86-87)

The jury in this trial retired for consideration of the case at 3:45 p. m. on Friday, November 30, 1956.

It is most earnestly submitted that the aforementioned action of the trial court was highly prejudicial to the defendants and a contributing cause for the jury rendering the \$25,000 verdict. When this jury was given one half an hour to further deliberate, with the instruction of the court that it would have to report back on the case at 10 a. m. the next morning, a Saturday morning, prevalently a non-working weekend day,

there is no doubt that the members of the jury became more careless, more frustrated and further disregarded the evidence and the instructions of the trial court on damages. It is common knowledge that a large percentage of individuals either leave town on Friday afternoon or evening for a weekend of endeavor or, to say the least, have definite plans and commitments for Saturdays. In addition the next day, Saturday, December 1, was the beginning of the month during which Christmas occurs thus occasioning activities on the part of individuals leading towards the Christmas and New Years holidays. It is further earnestly submitted that the jury, in view of all of these facts, most hurriedly considered the damage phase of this trial, to the end result of rendering a verdict which was improperly considered and, which not only went far beyond the evidence and involved imagination but also involved passion, emotion, and prejudice against the appellants.

It is further submitted that for a jury to finally decide on damages in thirty minutes, at the end of a four day trial, speaks of and emphasizes the improper action on the part of the court in the handling of the jury, and improper and unjustifiable action on the part of the jury in arriving at such an unconscionable verdict of \$25,000.

CONCLUSION

Appellee was employed as a teacher less than one-half of the years of his employment until the time for trial. As early as March, 1954 (accident occurred on June 8, 1954) he had informed American University that he was not going to teach there in September, 1954, and that he was seeking employment elsewhere. Appellee neither had a commitment for employment in the summer school at American University nor did he know what compensation he would have received from such summer school employment. As to the summer employment in Maine the evidence did not disclose any commitment with reference thereto nor any agreement as to what the compensation would have been for such employment.

The accident did not prevent appellee from getting any employment because the evidence disclosed that through an advertisement, and correspondence with over 72 colleges, universities and organizations, and personal contact with many of them, beginning in March, 1954 and continuing until after the accident, appellee was not able to get employment until January, 1956. Appellee's claim that he was going to get a position at Texas University at Austin was not substantiated by the evidence, because of appellant's Exhibit #3, hereinbefore set forth. The orthopedic physicians who testified established that even though appellee sustained injuries from the accident he could have resumed his work as a teacher as early as November or December, 1954, this being approximately six months after the accident. The only shock resulting to appellee from the accident was of a duration of one day, which was the day of the accident. Accident or no accident, appellee just could not get a position through his various efforts, because the colleges, universities and organizations he corresponded with and contacted did not consider favorably the applications of this 62 year old appellee.

Therefore, the jury should not have awarded appellee \$1, 000 as loss of summer employment in 1954, \$4, 500 because of lack of employment during the school year 1954-1955, and subsequent losses of \$2, 000 per year for six years, or on into the future until appellee is 70 years of age, as such items were not only not established in the evidence but such action on the part of the jury exhibited passion, emotions, and prejudice, and involved the wildest of imagination and speculation.

Medically, the evidence disclosed that as a result of the accident appellee had no fractures, no damage to the bone structure, nor damage to supporting ligaments, but merely damage to the soft tissues of his legs with a non-serious type of skin ulcer on one leg which did not

heal as quickly as his orthopedic physician had expected, because of lack of circulation. The evidence did establish by the testimony of appellant's orthopedic physician that appellee had many degenerative conditions which were not connected with or caused by the accident in any way and that the lack of circulation most probably resulted from his general degenerated physical condition.

After the trial court had instructed and authorized counsel for appellee on the use of the blackboard the trial court should not have permitted counsel for appellee to exceed his authority, in placing on the blackboard in full view of the jury items and amounts of damages which had not been established in evidence and which were without foundation in evidence, because such visual portrayal of these items resulted in the jury, in expression of passion, emotions and prejudice, fixing its verdict by the use of the total of \$19,300 displayed and an attorney's fee of one-third thereof, in the final amount of the verdict of \$25,000.

The trial court erred in handling the jury when it instructed the jury that if it did not return a verdict by 6:30 p. m. on a Friday evening it would have to report back on the case on the next morning, a Saturday morning, during the first part of December, the month during which the Christmas holiday occurs. This instruction to the jury caused the members thereof to become more careless and to more hurriedly arrive at a verdict in this four day trial, all to the prejudice of the appellants, one of which is a corporation.

A remittitur should not have been used by the trial court because the authorities referred to herein dictate that a remittitur should not be used when a verdict is a result of passion, emotions and prejudice.

The trial court must have recognized that there was an exercise of passion and prejudice on the part of the jury in rendering its verdict or otherwise it would not have used a remittitur.

It is most respectfully requested that the judgment appealed from be reversed and the case be remanded for a complete new trial.

Respectfully submitted,

CHARLES E. PLEDGER, JR.
RANDOLPH C. RICHARDSON

512 Washington Building
Washington 5, D.C.

Attorneys for Appellants

RICHARD W. GALIHER

Woodward Building
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Of Counsel

(i)

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JOINT APPENDIX

458

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Filed Aug. 18, 1954]

RICHARD B. CHRISTIE
3130 Wisconsin Avenue, N. W.
Washington, D. C.

Plaintiff

vs.

ROBERT E. HAYCOCK, JR. and
STANDARD FLOORS, INC., a corporation
1320 Q Street, N. W.
Washington, D. C.,

Defendants

Civil Action No. 3506-'54

COMPLAINT
(Personal Injuries)

1. Plaintiff is an adult, sui juris, and a resident of the District of Columbia. Defendant Robert E. Haycock, Jr., is an adult, sui juris, and a resident of the State of Maryland. Defendant Standard Floors, Inc. is a corporation doing business in the District of Columbia, at premises 1320 Q. Street, Northwest. The amount in controversy exceeds the sum of Three Thousand Dollars (\$3,000.00), exclusive of costs.

2. On or about June 8, 1954, at approximately 12:30 o'clock P. M., plaintiff, while walking north, in line with and on the west sidewalk approaching 4000 Wisconsin Avenue, Northwest, in the District of Columbia, was struck and run over by a motor vehicle owned by defendant Standard Floors, Inc. and then and there being negligently and carelessly operated by the defendant, said Standard Floors, Inc., acting by its agent and employee, the defendant Robert E. Haycock, Jr.

3. As a result of the foregoing negligent collision, plaintiff sustained

severe injuries to his legs, causing nervous shock, mental anguish, pain and suffering and permanent physical injuries. As a result of the aforesaid injuries, plaintiff has been disabled and prevented from engaging in his normal occupation as college professor, or any gainful employment, and has therefore suffered complete loss of earnings and will continue

459 in the future to suffer loss of income. As a further result, he has been caused, and in the future will continue to be caused, to spend large sums of money for medical care and hospital treatment.

WHEREFORE, plaintiff demands judgment against defendant Haycock and defendant Standard Floors, Inc., in the sum of Thirty-five Thousand Dollars (\$35,000.00), besides the cost of this suit.

A jury trial of all issues is demanded.

/s/ Paul B. Cromelin

/s/ Richard L. Walsh

* * * *

(Attorneys for Plaintiff)

[Filed Oct. 12, 1954]

460

ANSWER OF DEFENDANT STANDARD
FLOORS, INC. TO COMPLAINT

First Defense

The complaint fails to state a claim against this defendant upon which relief can be granted.

Second Defense

This defendant admits the allegations of paragraph numbered 2; admits the occurrence of the accident at the time and place alleged; admits the ownership of the motor vehicle; admits that defendant Haycock was its employee; denies that said motor vehicle was then and there being negligently and carelessly operated; and avers that it is without knowledge or information sufficient to form a belief as to the truth of the allegations regarding plaintiff's injuries, losses, expenses and damages.

Third Defense

Plaintiff failed and neglected to exercise due care for his own safety

at the time and place alleged in the complaint and this defendant avers that such failure and neglect caused or contributed to cause the injuries, losses, expenses and damages complained of by plaintiff.

PLEDGER, EDGERTON & RICHARDSON

By /s/ Charles E. Pledger, Jr.

* * * *

Attorneys for defendant
Standard Floors, Inc.

461 (CERTIFICATE OF SERVICE)

[Filed Nov. 8, 1954]

462 ANSWER OF DEFENDANT ROBERT E. HAYCOCK, JR.
TO COMPLAINT

First Defense

The complaint fails to state a claim against this defendant upon which relief can be granted.

Second Defense

This defendant admits the allegations of paragraph numbered 1; admits the occurrence of the accident at the time and place alleged; admits that he was operating a motor vehicle owned by defendant Standard Floors, Inc.; denies that he operated said motor vehicle negligently and carelessly; and avers that he is without knowledge or information sufficient to form a belief as to the truth of the allegations regarding plaintiff's injuries, losses, expenses and damages.

Third Defense

Plaintiff failed and neglected to exercise due care for his own safety at the time and place alleged in the complaint and this defendant avers that such failure and neglect caused or contributed to cause the injuries, losses, expenses and damages complained of by plaintiff.

PLEDGER, EDGERTON & RICHARDSON

By /s/ Charles E. Pledger, Jr.

Attorneys for Defendant Robert E. Haycock, Jr.

(CERTIFICATE OF SERVICE)

[Filed May 31, 1956]

463

PRETRIAL PROCEEDINGS**STATEMENT OF NATURE OF CASE:**

This is an action for damages for personal injuries alleged to have been sustained by P while walking north in line with and on the west sidewalk approaching 4000 Wisconsin Avenue, N.W. at which time P alleges he was struck by a motor vehicle owned by D Corporation and allegedly negligently operated by an agent or employee of said corporation as a result of which P alleges he sustained injuries.

Ds admit the occurrence of the accident; deny any negligence on their part and allege that any and all injuries which may have been sustained by P were the result of his sole or contributory negligence.

The pretrial statements of P and D respectively adequately outline the situation surrounding this action and are consequently adopted by the court and by reference made part of this pretrial statement and order of the court.

All stipulations, including those amended and initialled by counsel and by the court proposed by Ds in their pretrial statement are agreed to by the parties hereto and are likewise adopted by the court as the stipulations applicable in the trial of this action.

/s/ Chas. F. McLaughlin

PRETRIAL JUDGE

/s/ Richard L. Walsh

/s/ Charles E. Pledger, Jr.

[Filed May 31, 1956]

464

PRETRIAL STATEMENT OF PLAINTIFF

On or about June 8, 1954, at approximately 12:30 o'clock P.M., plaintiff, while walking north, in line with and on the west sidewalk approaching 4000 Wisconsin Avenue, Northwest, in the District of Columbia, was struck and run over by a motor vehicle owned by defendant Standard Floors, Inc. and then and there being negligently and carelessly operated by the defendant, said Standard Floors, Inc., acting by its agent and em-

ployee, the defendant Robert E. Haycock, Jr.

/s/ Richard L. Walsh

* * * *

Attorney for Plaintiff

(CERTIFICATE OF SERVICE)

[Filed May 31, 1956]

465

PRETRIAL STATEMENT OF DEFENDANTS

Defendants admit the occurrence of the accident at the time and place alleged; deny negligence and assert negligence on the part of plaintiff causing or contributing to cause the accident. Plaintiff's negligence consisted of failing to exercise due care for his own safety at the time and place alleged and under the circumstances and conditions then and there existing, including failing to keep a proper lookout.

STIPULATIONS:

1. Defendants' counsel shall be furnished with complete and itemized list of plaintiff's expenses and losses within 15 days of pretrial proceedings.

2. Defendants' counsel shall be furnished with complete and detailed list of plaintiff's injuries within 15 days of pretrial proceedings. This list shall specify which injuries are claimed to be permanent.

3. Plaintiff shall put up One Hundred Dollars (\$100.00) cash or a Two Hundred Dollar (\$200.00) bond with the Clerk of this Court as non-resident security for costs five (5) days in advance of trial.

4. Defendants have permission, if they so desire, to have plaintiff examined by a physician of their choice. Plaintiff to be in Washington 5 days in advance of trial for this purpose unless examination made in the meantime.

5. A list of witnesses expected to be called at the trial shall be exchanged between counsel for the respective parties within 15 days of pretrial proceedings.

PLEDGER, EDGERTON & RICHARDSON

By /s/ Charles E. Pledger, Jr.
 512 Washington Building
 Washington 5, D. C.
 Attorneys for Defendants

466 (CERTIFICATE OF SERVICE)

467 VERDICT AND JUDGMENT

[Filed Nov. 30, 1956]

This cause having come on for hearing on the 27th day of November 1956, before the Court and a jury of good and lawful persons of this district, to wit:

Bertha C. Jenkins	Dorothy A. Mc Leaf
Benjamin H. Craig	Miriam D. Sandler
Helen H. Poindexter	Grace E. Swartz
Francis G. Wadleigh	Rose V. Gardner
Edna N. Sater	Velma N. Baldwin
Mildred E. Coates	Sarah F. Speller

who, after having been duly sworn to well and truly try the issues between Richard B. Christie, plaintiff and Robert E. Haycock, Jr. and Standard Floors, Inc., defendants, and after this cause is heard and given to the jury in charge, they upon their oath say this 30th day of November, 1956, that they find the issues aforesaid in favor of the plaintiff and that the money payable to him by the defendants by reason of the premises is the sum of Twenty-five thousand (\$25,000.00) Dollars.

Wherefore, it is adjudged that said plaintiff recover of the said defendants the sum of Twenty-five thousand (\$25,000.00) Dollars together with costs.

By direction of	By	Harry M. Hull, Clerk,
Judge David A. <u>Pine</u>	/s/ Irene B. Burroughs	Deputy Clerk

[Filed Dec. 7, 1956]

470 **MOTION OF DEFENDANTS ROBERT E. HAYCOCK, JR.
AND STANDARD FLOORS, INC., A CORPORATION, TO
VACATE AND SET ASIDE VERDICT AND JUDGMENT FOR
PLAINTIFF AND FOR DIRECTED VERDICT UNDER RULE
50 OF THE FEDERAL RULES OF CIVIL PROCEDURE
AND/OR FOR A NEW TRIAL**

Defendants Robert E. Haycock, Jr. and Standard Floors, Inc., a corporation, move the Court to vacate and set aside the verdict and judgment for the plaintiff entered herein on November 30, 1956, and

A. For entry of Judgment for the defendants notwithstanding the verdict upon their motions for directed verdicts, pursuant to the provisions of Rule 50 of the Federal Rules of Civil Procedure, and for reasons therefor state:

1. The opening statement of counsel for plaintiff did not mention negligence or violation of Traffic Regulations or set forth matters which would be established in plaintiff's case, entitling him to recover. Further, Counsel for plaintiff should not have been permitted, over objection of counsel of defendants, to amend his opening statement because through motion of counsel for defendants for a directed verdict on the opening statement of counsel for plaintiff, plaintiff's counsel was permitted to be guided and educated as to what he should supply in his amendment to his opening statement.

471 2. Even though counsel for plaintiff was permitted to amend his opening statement it remained defective, as outlined in aforementioned paragraph numbered 1, in that counsel for plaintiff did not identify sufficient evidence to be offered in plaintiff's case to entitle him to recover.

3. Defendants' motions for a directed verdict at the conclusion of plaintiff's case and at the conclusion of all of the evidence should have been granted under the case law of the District of Columbia and elsewhere in that the plaintiff's case, and all of the evidence of the case, established

contributory negligence as a matter of law on the part of the plaintiff.

and/or in the alternative:

B. For a new trial, and for reasons therefor states:

1. The verdict was grossly excessive, unconscionable, and one which should shock the conscience of this Court.
2. The verdict is contrary to the evidence and the weight of the evidence.
3. The verdict is contrary to law.
4. Counsel for the plaintiff should not have been permitted to use the blackboard in exhibiting to the jury items and amounts of damages claimed by plaintiff.
5. Counsel for the plaintiff should not have been permitted to use the blackboard in exhibiting to the jury items and amounts of damages which had not been introduced into evidence.
6. Counsel for the plaintiff should not have been permitted to use the blackboard in exhibiting to the jury items and amounts of damages which were strictly speculative and without foundation in the evidence of the case.
7. When the jury returned to the Court room at 6:00 p.m., on Friday, November 30, 1956, and the foreman announced that a verdict had not been arrived at, the jury should have been excused until 10:00 a.m., Monday, December 3, 1956, for further consideration of the case instead of being informed by the Court that it could have another one-half hour for deliberation and if no verdict was arrived at by that time the jury would be required to report at 10:00 a.m., Saturday, December 1, 1956. Aforementioned handling of the jury by the Court constituted error and was highly prejudicial to defendants.

472

And for such further grounds as may be brought to the attention of

this Court at the oral hearing of this motion, which hearing is hereby requested.

PLEDGER, EDGERTON & RICHARDSON

By /s/ Randolph C. Richardson

* * * *

/s/ Richard W. Galiher

* * * *

Attorneys for Defendants

TO: Richard L. Walsh
1366 National Press Building
Washington, D. C.

Attorney for Plaintiff

PLEASE TAKE NOTICE that the memorandum of points and authorities in support of this motion is attached hereto. The rules of the Court require that if you oppose the granting of the above motion, you shall file with the Clerk of this Court within five (5) days from the date of service of a copy of this motion upon you, or within such further time as the Court may grant, or, as the parties to this suit may agree upon, the statement of points and authorities upon which you rely, and serve a copy thereof upon counsel for defendants.

/s/ Randolph C. Richardson

/s/ Richard W. Galiher

473 (CERTIFICATE OF SERVICE)

[Filed Jan. 3, 1957]

474

O R D E R

Upon consideration of defendants' motion "to vacate and set aside verdict and judgment for plaintiff and for directed verdict under Rule 50 of the Federal Rules of Civil Procedure and/or for a new trial," together with memoranda in support thereof and in opposition thereto, and oral argument of counsel thereon, it is, by the Court, this 3d day of January 1957,

ORDERED that the motion to vacate and set aside the verdict and judgment for plaintiff and to enter a judgment for defendant under Rule 50 be and the same hereby is denied;

AND IT IS FURTHER ORDERED that if, within ten days from this date, plaintiff shall file a remittitur of that part of the verdict and judgment in excess of \$17,500, the motion for a new trial will be denied as of the date of the filing of said remittitur; otherwise, said motion will be granted.

/s/ David A. Pine
Judge

(CERTIFICATE OF SERVICE)

475 [Filed Jan. 9, 1957]

PRAECIPE

UNITED STATES DISTRICT COURT
For the District of Columbia

the 9th day of January 1957

RICHARD B. CHRISTIE)

vs.)

ROBERT E. HAYCOCK, JR. et al)

Civil Action No. 3506-54

The Clerk of said Court will please enter a remittitur of that part of the verdict and judgment in the above cause in excess of \$17,500.

/s/ Richard L. Walsh

United Press Building

Attorney for Plaintiff

[Filed Feb. 8, 1957]

476

NOTICE OF APPEAL

Notice is hereby given this 8th day of February, 1957 that defendants hereby appeal to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 30th day of November, 1956 and from the Order of this Court denying a Motion for a New Trial entered on the 9th day of January, 1957 in favor of plaintiff

against said defendants.

PLEDGER, EDGERTON & RICHARDSON

By /s/ Randolph C. Richardson

* * * *

/s/ Richard W. Galiher

* * * *

Attorneys for Defendants

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

[Filed March 4, 1957]

R1

Washington, D. C.
 Tuesday, November 27, 1956

The above-entitled matter came on for trial before JUDGE DAVID
 A. PINE and a jury at 11:50 a. m.

* * * * *

255 OPENING STATEMENT ON BEHALF OF THE PLAINTIFF

MR. WALSH:

* * * * *

259 We will have expert testimony to show the jury and the Court that
 it is the usual practice in the academic world of higher education, uni-
 versities and colleges, for the professors and teachers to find their own
 jobs, and that when a professor is looking for a job, he must write hun-
 dreds of letters and make hundreds of contacts and actively pursue it.
 There is no system.

* * * * *

4 RICHARD BENJAMIN CHRISTIE

was called as a witness and, having been first duly sworn, was examined
 and testified as follows:

DIRECT EXAMINATION

* * * * *

6 BY MR. WALSH:

* * * * *

7 Q. What is your educational background? Are you a graduate of
 college? A. Yes.

8 Q. What college? A. Yale University.

Q. And what year? A. 1914.

Q. 1914. Will you tell the Court and the jury what you did follow-
 ing your graduation from Yale, without going into irrelevant details?

What was your first job? A. My first job was a teacher of mathematics
 and English at Portland Academy, Portland, Oregon.

Q. How long was this? A. Three years.

Q. Where did you go from there? A. From there I was in service, in the -- Well, first I went back to New York after that and took a job in the Lindy Air Products Company.

Q. And then you went into service. What branch? A. Then I went into the Navy.

Q. How long did you serve there? A. Two years, about.

Q. When you were released from the service, what did you do?
A. Then I went into the advertising business.

Q. And how long did you remain in that business? A. I was in that about forty years -- or, no, not that long. Let's see. About twenty-
9 five years.

Q. Will you name some of the jobs you held in that field? A. I was in the research department of the Frank Seaman advertising agency.

Q. In New York City? A. In New York City. Then, after that I went with the William Green Corporation as an account executive. They did work for transportation companies and also for industrial organizations.

Q. And then? A. Then I went with the Johns Manville organization as their publicity and public relations man for six years.

Q. And then? A. Then I went with Guaranty Trust Company of New York City as the advertising man for the Fifth Avenue and Madison Avenue offices.

Q. What years was that employment with the bank? A. Let's see. That was in 1929 to 1945, I believe.

Q. What was your salary on that Guaranty Bank job? A. It was, it began with five thousand and bonus, and when I finished, it was seven thousand and bonus,

Q. When you left the bank where did you go? A. I went with the Kent State University.

Q. Was that your first teaching job since the three years immediately following your graduation from Yale? A. That was my first
10 teaching job, yes.

Q. Up to this point, your going to Kent to teach, had you ever been

unemployed for any appreciable length of time following your graduation from Yale? A. No.

Q. You had been continuously employed? A. Yes.

Q. At Kent University, what was your job? A. Professor of advertising, marketing, and market research.

Q. What was your salary? A. Well, it started with 4800 -- that was including summer school -- and then, when I left, it was 5600.

Q. When you give these salaries, is that for a full year or for nine months? A. No, that was for, that included the summer school.

Q. Summer school. So that would be for the academic year plus summer school? A. Plus summer school.

Q. How did you happen to leave Kent? A. Because I had a chance to come to Washington, and I had wanted to do it, and I took the offer at American University.

Q. Is Kent a State university? A. It is a State university.

11 Q. Were you a member of a pension plan there? A. Yes, the university had a regular pension plan.

Q. You were a member of it? A. And I was a member of it.

Q. And you made contributions to it? A. I did, regularly.

Q. How did you come to learn of this opening at American University in Washington? A. By writing.

Q. And when did you come to American University? Can you give the month and the year? A. It was September 1953, I think.

Q. September 1953? A. Yes.

Q. So that you had been on that job from September 1953 to June 1954 when this accident occurred? A. That is right.

* * * * *

26 Q. Were you in front of the truck? A. Yes, I was.

Q. What did you then do? A. I jumped as best I could to avoid being run over, over a portion of my trunk.

Q. Did you continue in the direction that you had been walking?
A. I continued in the same direction by jumping to get out of the way.

Q. Will you describe just how you did jump? A. Well, I thought

the best thing to do was to jump in a northerly direction, because the truck was coming down rather rapidly, and so I jumped to avoid having the truck go over my body, which would have killed me if it had. So then -- shall I describe it further?

Q. Describe further what happened. A. Then the bumper hit my body and knocked me down.

Q. Will you stand up and show us where it hit you, where the bumper hit you? A. Well, I can guess now. (Standing) It was about here, I should say. (Indicating)

Q. Was in your left thigh, you are indicating? A. Yes. I was going north, so it would be the left. And it knocked me down immediately, 27 and I fell in the direction in which I was jumping, and I fell flat, and so flat that both feet were on the ground, and the truck ran over both of those feet. I saw the wheel go over my legs.

Q. Sit down, Mr. Christie. When you were knocked down by being struck in the left thigh by the bumper, where did you fall? Were you still in the driveway? A. I fell out toward the road. I fell in a northerly direction.

Q. Now, that driveway, was that graded so that it sloped down toward the roadway? A. Yes, it graded. And I jumped far enough to reach the gutter.

Q. Did your head hit anything? A. Well, it hit the road, because I fell right out into the road when the bumper hit me.

Q. Were you unconscious at any time? A. No, my head was not hit. It just hit the road, that's all. It was not --

Q. After you were knocked down, what happened to the truck?
A. The truck stopped immediately after it went over both my legs.

Q. And you saw this truck go over your legs? A. I saw that, ab- 28 solutely.

Q. Which wheel was it, Mr. Christie? A. It was the front left wheel. Let's see. To the driver's left, yes.

Q. Now, how long after the wheel went over your legs did it take for the truck to stop? A. Oh, it didn't take long. He stopped almost

immediately after it went over.

Q. So that when he stopped, where were your legs with respect to the truck? Were they under the truck? A. They were under, between the back and the front wheels.

Q. And under the truck? A. And under the truck.

Q. And what portion of your body, and how much of your body was outside the truck's --- A. All the rest of my body was out beyond the truck.

Q. Well, when the truck stopped, what happened? A. What happened?

Q. Yes, what happened? A. Well, I stayed there, I was afraid to move, and I said, "Is anybody going to help me up?" and then the driver said, "Yes, I'll help you up," and he jumped down.

Q. You heard the driver say something. Where was he when he said whatever he did say? A. Well, let's see.

29 Q. Was he in his cab?

MR. RICHARDSON: If Your Honor please, let the witness answer the questions.

A. He said, "I'll help you up," and he assisted me up into the truck. Then he said, the first thing I think he said was, "I didn't see you." Then he said, "What hospital --" I was bleeding quite rapidly from both legs, and the blood was going over my trousers, and he said, "What hospital would you like to go to?" I said, "I don't know. Any of the hospitals around here." He said, "Well, how about Georgetown?" because he thought that was nearer, I think. I said, "All right, we'll go to Georgetown."

There was some other conversation. I was trying to think what it was. Oh. I said, "This is a terrible time for me to have anything like this occur," because I was in the process of getting a job down in Texas.

BY MR. WALSH:

Q. Did you ask him why he hit you? A. Well, he said, "I didn't see you."

Q. Did he say anything about, anything else about hitting you?
A. No, not that I can recall, no.

Q. Did he say anything about the wheels going over you? A. Oh, he said, "It felt like I was going over a barrel."

30 Q. Now, when you first heard his voice, where was he? A. Well, he was up, sitting on the seat of the truck.

Q. And did you see him? A. Yes, I looked up at him. I was on the ground.

THE COURT: Would this be a good time for us to find out what kind of a truck it was? Do you know?

THE WITNESS: It was a, well, something like a gravel truck, to me. I am not very well versed on trucks.

THE COURT: I thought maybe you knew. All right. Well, was it a delivery truck or a stake body truck, or a --

THE WITNESS: The seat of the truck, of the driver, was very high.

BY MR. WALSH:

Q. Will you describe the truck? A. I noticed that the driver sat very high on the seat. I didn't see what kind of a truck it was except that it looked like the typical gravel truck, to me. I am not very well versed on the different kinds of trucks, but it --

THE COURT: All right. You don't know whether it was a delivery truck or some other kind of a truck?

THE WITNESS: No. It was quite a large truck.

THE COURT: I see.

31 MR. RICHARDSON: What was that? I didn't hear what he said.

THE COURT: He said a large truck.

BY MR. WALSH:

Q. Mr. Christie, the driver of that truck, is he here today?
A. Yes.

Q. Will you identify him, point him out, please? A. I think he is the first man there.

Q. You are identifying the defendant, Mr. Haycock? A. Yes.

MR. WALSH: The record will show he is identifying the defendant, Mr. Haycock, as the driver.

THE COURT: Yes.

BY MR. WALSH:

Q. When you left the scene of the accident in the truck, where did you go? A. We went to Georgetown Hospital.

Q. Were you feeling any pain? A. I was feeling a great deal of pain.

Q. Had your clothes been torn or bloody? A. My trousers had been torn, and they were bloody.

Q. Was any property broken or destroyed? Did you have any on your person? A. No, except my glasses flew out of my pocket, and
32 were scratched considerably from going across the road.

Q. Were they thereafter usable? A. Well, I have been able to use them but they were in pretty bad condition. The doctor said I shouldn't.

Q. When you arrived at Georgetown Hospital in the truck, how did you get inside the hospital, if you did? A. By the aid of one of the orderlies and one of the nurses.

Q. And where did they take you? A. They took me into the emergency room, put me on a stretcher.

* * * * *

34 Q. Mr. Christie, were you put to bed in Georgetown Hospital?
A. Yes, immediately.

Q. And was that the same day of the accident? A. Yes.

Q. And did you remain in Georgetown Hospital? A. For a month.

Q. One month. Did you receive any treatment from a physician?
A. Yes, from Dr. Rush.

Q. Is that Dr. Robert Rush? A. That is right.

Q. Did he treat you in the hospital? A. Yes, every day.

Q. He saw you every day? A. Sometimes twice a day.

Q. How long did you remain in bed? A. Almost the entire time.
In fact, I couldn't get out of bed.

35 Q. Did you get out of bed for any purpose, any personal needs?
A. No.

Q. Did you feel any pain during this period? A. I had a great

deal of pain while I was in bed, especially at night, and it was bleeding, a running sore. It was a great deal of pain, which they had to give me sleeping pills, to sleep.

Q. Did there come a time when you were able to get out of bed?

A. Not until the end. I mean after I had been there a month. Then they let me up in a wheelchair, and I had to be helped by the nurses to get in the wheelchair, or the orderly, rather.

Q. And then did there come a time when you left the hospital?

A. I was in the wheelchair and on crutches for about a week before I left the hospital after I had been in bed, and the doctor said it would take three days to learn how to use the crutches properly.

MR. RICHARDSON: May it please the Court, I have stipulated with Mr. Walsh that he would not have to bring anyone from the Georgetown Hospital to identify this bill on the part of the hospital.

THE COURT: Do you stipulate that it is a reasonable bill?

36 MR. RICHARDSON: Yes.

THE COURT: Very well.

BY MR. WALSH:

Q. Mr. Christie, I show you this and ask you to identify it, please.

A. Yes; that is the bill from the hospital.

* * * * *

37 BY MR. WALSH:

Q. When you went back to your apartment, did you continue to be treated by Dr. Rush? A. I was treated by Dr. Rush for about seven months afterward. He had me come in three times a week for the first three months, and then I went for the next three months, I was there two times a week. Then, for the last month, I was there once a week. So it was for seven months, all together.

Q. Following your return home, was it possible for you to get around on your own transportation? A. For a month and a half I couldn't go anywhere except by taxi, or somebody who was kind enough to bring their car around and I went with them.

Q. And how much a day did you spend on taxicabs? A. Had to go

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deal of pain while I was in bed, especially at night, and it was bleeding, a running sore. It was a great deal of pain, which they had to give me sleeping pills, to sleep.

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Q. Following your return home, was it possible for you to get around on your own transportation? A. For a month and a half I couldn't go anywhere except by taxi, or somebody who was kind enough to bring their car around and I went with them.

Q. And how much a day did you spend on taxicabs? A. Had to go

to all my meals. . That was three times a day, by taxi.

38 Q. That was a total of how much a day? A. That was about three dollars a day.

Q. For a month and a half? A. For a month and a half.

Q. Mr. Christie, had you planned or intended to return to American University for the ensuing academic year beginning in September 1954?

A. No. In March I had thought that I would -- It didn't offer me the opportunity that I wanted, and I started to correspond with other universities. Leading among them was the Texas University, Texas University at Austin.

Q. Mr. Christie, did you tell anyone at the university that you would not be back? A. I didn't say that I would not be back, but I said that I was thinking of elsewhere.

Q. What is the customary procedure for college professors to seek employment at another college? A. Well, usually it is done in the early spring, beginning in March, April, May, and by June nearly all the appointments are usually made. During the month of June they might very easily be made. And that was the critical time for me, because that was the time that I was down flat in bed, and my correspondence had to be all given up.

Q. Had you corresponded before the accident? A. Oh, yes.

39 Q. Well, how many letters did you write, if you can approximate the number? A. I wrote, I would say, at least seventy-five.

Q. And did you receive any replies to them? A. Yes. I was looking for openings, and that is the way it is usually done, rather than go to an employment agency.

Q. While you were in the hospital, did you have any colleges in which you had hopes of getting a job? A. Yes. The Texas University, I thought, was going to be it, and I thought it was so near to being a sure possibility that I would hear from them most any time, that they expected me to come down there. But I found out later that they found a local man because they hadn't heard from me during the time. See, during that whole month they hadn't heard from me.

* * * * *

Q. Well now, when you were in the hospital, were you able to engage in any correspondence directed toward obtaining employment in colleges? A. Well, I did, but I didn't do it until I was able to. I did

40 it finally the last week, I believe, that I was in the hospital, I had a stenographer come in, and I continued to write.

Q. And that was in --? A. That was the last week in the hospital.

Q. The last week in the hospital? A. Yes.

Q. That was in July? A. Yes. That was June.

Q. June. A. Yes.

Q. When you were discharged from the hospital, did you make any efforts immediately to pursue this search for a job in a college?

A. Oh, it couldn't be done. I was in too much pain to do that.

Q. Did there come a time when you were able to get around under your own power, without crutches or cabs or -- A. Yes, but that was a month and a half after I had been going to the -- Well, when I was using a taxi, I used a taxi for a month and a half, in order to go anywhere.

Then, after that, I was able to walk very slowly and get around by the help of other people. I had to have people help me across the street, for instance, whenever I went out alone, and it was rather embarrassing sometimes to wait for people to help you across the street. That lasted

41 for about, oh, a month. Then, after that, I was able to get around myself. But that was a long time after.

Q. Mr. Christie, when did you stop drawing salary from American University? A. About a week after the accident.

Q. Did you have any other source of income at that time? A. No.

Q. How did you live? A. Well, I lived by drawing my pension out of Kent State University, or out of the pension fund in Ohio, the State of Ohio.

Q. How much was that, approximately, if you know? A. It was about \$1500; and they advised me very strongly not to do it, but I had to do it.

Q. Did you have any savings of your own in a local bank or --

A. I had, yes, about six hundred dollars.

Q. And what became of that? A. It was all used up in living.

Q. How much rent did you pay in your apartment? A. \$75.

Q. And what became of the approximately \$1500 which you drew out of the pension fund in Kent? A. It was used for living, completely.

42 Q. Did you have any other source of funds at that time? A. No, I had no other source at all.

Q. Did you borrow any funds? A. Yes, I borrowed from two banks, and also from a friend.

Q. How much did you borrow from a friend? A. About a hundred dollars.

Q. Was he a neighbor? A. Yes.

Q. What banks did you borrow from? A. I borrowed from the National Metropolitan Bank and the National Bank of Washington.

Q. How much did you borrow from the National Bank of Washington? A. About two hundred dollars.

Q. And from the National Metropolitan Bank? A. Well, now, let's see. That was about four hundred, I believe.

Q. As a total? A. As a total.

* * * * *

43 Q. Were you willing to take a nonteaching job? A. Oh, yes.

Q. Why were you willing to take a nonteaching job? A. Well, because there aren't many openings constantly in the teaching field in universities. There may be in the secretarial schools, but not in the universities.

Q. That is, after the beginning of the academic year? A. Yes.

Q. There are no jobs open? A. After you pass June it is very difficult to get an opening in a college.

Q. You were willing to seek and fill other employment? A. That is right.

Q. Did there come a time in the winter of 1954-55, following the accident, when you fell behind in your rent at the Chancery Apartments? A. Yes. I fell back two months in my rent, and I had to borrow that

money from the bank.

Q. When you fell behind two months, did the apartment take any action, legal or otherwise? A. Yes. They threatened to put me out, and they did.

44 Q. And they did? A. Well, they attempted to.

Q. Did they file suit? A. They filed suit.

Q. And did you pay up the back rent? A. Then I borrowed from the bank and paid.

Q. Did there come a time in the spring of 1955, following the accident, when you went to the Veterans Administration? A. Yes. In the spring of 1955, about March, I went there to see if I could get the pension, or the disability pension, and they examined me by two doctors, two or three doctors, and said that they were willing to put in the claim for me for the disability pension. Then, this friend of mine from New York invited me to come and stay with him during the summer, and at the end of that summer I received a lump sum from the pension of 66-fifteen a month for three months.

Q. Now, following your examination by the Veterans Administration doctors, were you informed that you would be granted a disability pension? A. Yes. He said, "I will grant you a permanent disability pension."

* * * * *

45 Q. Mr. Christie, what was your salary at American University, if you remember? A. It was -- I thought I was going to get summer school there, and I intended to -- It would have been 4,450.

Q. How much was it for the nine months ending in June? A. \$3,450.

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Q. Did you have any other alternative opportunity to work that summer? A. Yes. I had an opportunity to go up to Portland, Maine, on a personnel job there.

46 Q. How much would that have paid for the summer? A. That would have paid me about a thousand dollars.

Q. For how many weeks, Mr. Christie? A. How many weeks?

It would have been months. I think two months and a half.

Q. About ten weeks? A. Yes.

Q. And what was the name of the man who was going to help you get that job? A. Mr. Thayer.

Q. And had he written to you about it? A. Yes, he had.

Q. Now, Mr. Christie, you stated that you made certain efforts to get a noncollege job in Washington in order to pay your living expenses.
A. Yes.

Q. What was the condition of your legs at this time? A. Well, they were not very good. I had a great deal of pain at night when I was trying to get some sleep and couldn't, and then it was difficult to go around and look for a job, even though I could walk, because of the lack of sleep and the pain it gave me while I was walking. Quite often it hemorrhaged at night, and there would be a pool of blood both in the bed and on the
47 floor, from hemorrhages. It was an abscess that had developed there, and it was a very large abscess.

Q. Professor, was it in accordance with Dr. Rush's orders and instructions that you walk around the city? A. Well, he said I had better try to stay off it as much as possible.

Q. Well, why didn't you? A. I didn't because I had to live. You can't live and stay at home.

* * * * *

50 Q. And then, that was discontinued when you informed them you were going to make 1400 a year? A. That was discontinued as soon as I informed them.

Q. Now, during this time following your going to Winter Park, were you able to pay any of the bills related to your accident? A. I couldn't even pay all of my living expenses, so I didn't pay the bills.

51 Q. By the way, did Dr. Rush ever render you a bill? A. Yes, he did.

Q. Do you know how much it was? A. It was \$325.

* * * * *

Q. Following your departure from Washington for Scarsdale, did

there come a time when you experienced symptoms of pain, bodily pain, --

A. Oh, yes.

Q. -- other than your legs? A. Yes. For a long time, regularly, I had felt gnawing and burning pains in my stomach.

Q. Well, when was this, Professor? A. Oh, --

Q. When did you first notice this? A. It was about a year ago.

Q. About a year ago? A. Yes. And I didn't know what it was. I thought it was probably severe indigestion.

52 Q. Was this before you arrived in Winter Park? A. It was just about -- shortly after that time.

Q. Will you describe these symptoms, please? A. Well, they usually would happen after meals, after lunch as a rule. In the mornings it wasn't so bad, but after lunch and after dinner, I had terrific pain. I thought it was simply that I didn't know how to eat, or I wasn't eating the correct things. Then they kept persisting, so I knew there was something wrong, finally, and I got a terrible cold, it was flue, with a fever, and I thought I had better go to the doctor. I had felt lack of energy and lack of vitality, and I went to the doctor, and he gave, took a blood count and a cardiac treatment, and I had no more than gotten home after I had been to his office when he called me up and he said, "Go to the hospital immediately." He said, "You are in a very bad way from a bleeding ulcer," and he said, "You would collapse if you kept on doing the work that you were doing."

It was all a great surprise to me. I immediately packed up and went to the hospital.

Q. Do you remember what date that was that you went to the hospital? A. That was October the 19th.

Q. 1956? A. Yes.

* * * * *

53 Q. Well, you had been experiencing these pains, but you continued to work? A. I continued to work. And he said that was the worst thing I could do, that kind of work.

Q. Well, the doctor sent you to the hospital on October 19th. What

happened in the hospital? A. Well, they gave me X-rays to find out --

Q. Do you know how many X-rays they gave you? A. They gave me about ten X-rays, I believe.

Q. What else? A. Then they gave me antibiotics, a great many of them, and blood transfusions.

Q. How many blood transfusions? A. I had four blood transfusions, and I felt new life coming back the minute I got them.

Q. How long did you remain in the hospital? A. I was there twenty-six days.

Q. When were you discharged? A. November the 14th.

Q. Were you rendered a bill by that hospital? A. Yes.

Q. What was the total amount, if you know? A. The total amount was about \$600.

54 Q. Did you know the daily rate for the room? A. The daily rate was twelve dollars.

Q. For twenty-six days? A. It was a semi-private room.

Q. And that was for twenty-six days? A. Twenty-six days.

Q. Do you know what the cost of the X-rays were -- the charge, rather? A. The X-rays came to about \$90.

Q. And do you know what the charge for the four blood transfusions were? A. They were \$35 for the first one and \$25 for all the other three.

Q. For each of the other three, or all of them? A. Each of the other three.

Q. Do you know what they charged for the laboratory work, the blood count? A. The blood count? I have forgotten, but it came to about \$70, I believe.

Q. And the antibiotics? A. The antibiotics were about \$40.

Q. Now, have you paid this bill? A. No, I haven't.

Q. Have you paid any of it? A. I can't-- what's that?

55 Q. Have you paid any of it? A. I haven't paid any of it, no.

* * * * *

Q. Did Dr. Ramsey treat you? A. Yes, he treated me, and he

still is.

Q. How often did he treat you? A. Every day.

Q. Every day while you were in the hospital? A. Every day while I was in the hospital.

Q. Did you visit him at his office? A. Three times.

56 Q. What other treatment did he give you, other than that?

A. Well, he found from the condition of my general condition, he said there was a spot on my lungs, and he is going to doctor me for that now.

Q. I am referring to what treatment he gave you. Did he take any tests? A. Oh. He took blood counts and urine tests, and he examined the stool.

Q. Did he render you a bill? A. Yes.

Q. And do you recall how much that was? A. \$177.

* * * * *

57 Q. Who examined you when you first arrived in Washington?

A. Dr. Sullivan.

* * * * *

Q. Did he render you a bill? A. Yes.

Q. How much? A. \$50.

Q. And have you paid that? A. No.

58 Q. Were you subsequently examined by Dr. Rush? A. Yes, I was.

Q. Will you describe -- A. Well, Dr. Rush looked at my leg where it was injured, and he found that the sore was still there, after two years, that it was still in an inflamed condition. That was where the abscess was on my leg.

Q. Prior to this accident, had you ever had any physical disability of any consequence, any serious nature, illnesses? A. Nothing to speak of at all.

Q. How about your digestive system, the stomach? A. My stomach was cast iron.

Q. Did you have any difficulty with eating? A. Not at all, never. That is the reason it worried me.

* * * * *

65 Q. Were your clothes ruined? A. Yes, they were.

Q. What were you wearing? A. A light suit.

Q. What was the value of that suit? A. About \$80.

66 Q. And you have testified that your glasses were injured. A. Yes, they were.

Q. What happened to them? A. They were scratched so badly that you could hardly see through them.

Q. What was the value of those glasses? A. \$35.

Q. Now, you have testified that when you went to Florida in October, you thereafter found employment. When did you actually find employment with this newspaper? A. Right after New Year's, the day after New Year's.

* * * * *

67 BY MR. WALSH:

Q. Do you know how much you made from January 1 until you went into the hospital, a week? A. On an average, I think it would be, about \$45 to \$50. That is an average.

Q. At this time, speaking of the immediate present, yesterday and today, perhaps, what is the condition of your legs? What trouble do you have with them, if any? A. Well, the left one pains considerably now and then, and it is still sore. It is inflamed, and it has not healed completely.

68 Q. Do you have any other difficulty with them? A. The right one is swollen considerably, so that I notice it when I put on my shoes. The swelling has never completely gone down.

* * * * *

Q. What is your physical condition and nervous and mental condition with respect to holding down a job as a college professor at this time? From your knowledge of the job, could you hold one down now with --
A. Well, the nervous tension would certainly make it quite difficult to draw yourself together enough to get up before a class.

* * * * *

69 MR. WALSH: This is a carbon copy of a contract signed by Hurst R. Anderson, president of American University, addressed to Mr. R. B. Christie, Kent State University, Kent, Ohio, dated September 14, 1953:

"Dear Mr. Christie:

"It has been my pleasure to recommend to the Board of Trustees the following contractual arrangement for you:

"Position and Rank: Assistant Professor of Advertising.

"Salary: \$3,450.00 for services during the fall and spring sessions, 1953-1954.

"Effective: September 15, 1953.

"Period: September 15, 1953 - June 30, 1954.

70 "If the appointment meets with your approval as described above, will you please sign on the line provided for the purpose on the attached copy and return it to my office as soon as possible."

BY MR. WALSH:

Q. Mr. Christie, did you sign the attached copy and return it?

A. I did.

Q. And that constituted your contract of employment? A. That is right.

Q. Mr. Christie, while you were in the hospital thereafter, did you make any efforts to secure a job at a college as a professor? A. I did, at the last week of the time I was there. As I said yesterday, I had a stenographer come in at that time, because I was getting over the pain of the first part of the hospitalization.

* * * * *

72

CROSS EXAMINATION

BY MR. RICHARDSON:

* * * * *

82 Q. Professor Christie, when was it, when was the earliest date that you decided to leave American University? A. I think it was around March.

Q. And March of what year? A. 1954, it was.

Q. And that was the same year in which this accident occurred, wasn't it? A. Yes.

Q. (Continuing) -- this accident occurring in June? A. Yes.

83 Q. So then, as of March, you had decided not -- A. Well, I hadn't exactly decided. I had thought that I would like to go where there were more opportunities.

Q. Again I refer to the deposition, on page 41:

"Did you make any attempt to go back to American University in September of 1954?

"Answer: No, I had already told them I wasn't.

"Question: When was that?

"Answer: Back in March.

"Question: You told American University in March of 1954 you were not going to teach there in September 1954?

"Answer: Yes.

"Question: Is that right?

"Answer: Yes."

A. As near as --

THE COURT: Wait just a minute. He simply read something. Now, the next question is, did you make those responses to those questions?

THE WITNESS: I did.

THE COURT: Very well.

* * * * *

88 Q. How and just when did you see the left front wheel go over your legs? A. I could see the wheel pass over my leg, and my leg was on top, one was on top of the other, and therefore, the left leg got all of the brunt of the wheel, but the right leg was affected also.

* * * * *

89 Q. Did the driver of the truck carry you to the cab? A. Yes.

Q. He picked you up off of the street and carried you to the cab?

A. Well, he helped me get in.

Q. Did you walk? A. I did not. I made an effort. That's all I

could do.

Q. I am asking you, did you walk from the place you fell? A. I didn't walk. I leaned on him completely, as you would on a crutch.

90 Q. Were your feet on the ground? A. Well, they dragged on the ground, yes. I wasn't walking any more than an injured man would walk.

Q. Did you take steps? A. I don't recall.

Q. Is it your testimony that the driver dragged you from the place that you fell? A. He didn't drag me; he helped me, and I made --

Q. Well, how did you get there, Professor Christie? Explain to the Court and the jury. A. Why, I leaned on him as you would on a crutch, and he helped me get from the, the short distance it was to the side of the truck, to get in it, and he lifted me up.

Q. He lifted you up where? A. Into the seat.

Q. He lifted your body up into the seat? A. That's what I remember.

Q. Did you take any steps at all? A. Well, I might have taken one or two steps, yes. You can.

Q. Now, when you got to the hospital, -- and Emergency Hospital was the hospital, wasn't it?

THE COURT: No, Georgetown.

MR. RICHARDSON: Georgetown; I beg your pardon.

91 BY MR. RICHARDSON:

Q. (Continuing) -- Georgetown Hospital, how did you get from the truck into the hospital, by way of movement, now, of your body? A. The same as I did before, with the aid of an orderly and a nurse.

Q. Did the driver of the truck help you in any way? A. No, he didn't.

Q. Did the driver of the truck go in the hospital? A. He went in the hospital, but not in the emergency room.

Q. But he did not help you go in the hospital at all? A. Well, not that I remember, no.

Q. And did you take any steps from the truck? A. Slightly. I

made effort. They were painful, and therefore you only make an effort.

* * * * *

92 Q. Is it not a fact that you had written letters seeking other employment as early as March of 1954? A. I believe it was in that month.

* * * * *

100 Q. Professor Christie, I present to you this photostat copy of an instrument, and I ask you whether or not this correctly sets forth the universities and organizations that you wrote to, seeking employment, from the time before the accident, and I ask you to fix until what time.

A. These are some of them, of the universities I wrote to, and they are some of the places that I went to, here in Washington, as well.

Q. So that is a correct statement of some of the places --

A. Some of them, that is right.

Q. -- that you contacted? A. That is right.

Q. You contacted every one, every organization and college and university listed on that sheet? A. These were by writing; these were by actual contact. (Indicating)

Q. Did you contact all of them? Did you? A. Yes.

Q. I see. With reference to seeking employment? A. Yes.

101 Q. And did you get employment with any of them? A. No, I didn't.

THE COURT: Now, this was all before the accident?

BY MR. RICHARDSON:

Q. This was from a time before the accident that you wrote these?

A. Oh, no. This wasn't all before. Some of them were, and some were after.

Q. Professor, it was from a time before the accident until what time? That is what I want to know. A. I don't know the exact time of those.

Q. But some of these you wrote -- A. Some of them before and some after.

* * * * *

Q. Professor Christie, at the time of the accident, did you have any commitment from any college or university with reference to employment? A. No definite commitment, but it was one that I thought might break.

Q. And with what organization or university? A. The Texas University at Austin.

Q. You say it wasn't a definite commitment, but you thought it was one that would break? A. Yes.

Q. Will you further explain that? A. Well, from what they had said, I could judge between the lines that they were interested in my background and they wanted to know what the possibility was to consider an opening, and then a friend of mine who teaches there, who was a professor with me at Kent, wrote to me and said that he thought they were going to take me.

Q. But you had no definite commitment from them? A. No definite commitment. I was waiting for that, at the time of the accident.

109 Q. And from no other college did you have that? A. No, not as definite as that.

Q. Not as definite as what? A. Well, I mean there was nothing where there was an opening and they were considering me at the time. You have to find the openings. That is what I wrote all those letters for.

Q. There was no opening where they were considering you? A. No openings where there was a possibility of my fitting in their program.

Q. I see. Professor Christie, within your recollection did you, in any of your correspondence with organizations, colleges and universities, after the date of the accident, mention to such organizations, colleges or universities, any physical disability on your part? A. No, I didn't mention it.

Q. Then, it is a fact that despite the accident, you were seeking a position -- A. Oh, yes.

Q. -- as an instructor? A. Absolutely. I was seeking it.

Q. When was the first time that you could physically assume the

duties of an instructor after the accident? A. Well, regardless of
110 what I thought, the doctor --

Q. I am just asking you the question, Professor Christie. You
give me the answer, please, sir. A. Well, state that again, will you?

Q. When was the first time after the accident that you felt that
you were physically able to fulfill the position of an instructor?

A. Well, I went after a position before I thought I was physically able.

THE COURT: That is not responsive, Doctor.

THE WITNESS: No?

THE COURT: Will you make a responsive answer. If you don't
remember the question, it will be read back to you.

THE WITNESS: Read it once again, or say it once again.

MR. RICHARDSON: Let the reporter read it, please.

THE REPORTER (Reading):

"When was the first time that you could physically assume
the duties of an instructor after the accident?"

THE WITNESS: Well, I didn't feel physically able, but I went
ahead and did it.

THE COURT: Will you answer the question? Was there ever a
time when you felt physically able to resume the duties of professor?
That is what he wants to know; and if so, when?

111 THE WITNESS: I would say about six months afterward.

THE COURT: All right. Now, does that answer your question?

BY MR. RICHARDSON:

Q. And what month would that be? A. About December.

Q. I refer back to the deposition, page 42: (Reading:)

"Question: As far as the accident was concerned, were
you able to return to work as of the academic year beginning
in September 1954?

"Answer: Well, I think I could. I don't know.

"Question: You think you could?

"Answer: It all depends on what I have to do. If you have
to stand before a class, no. Some colleges require you to stand.

Others will allow you to sit down."

Did you make that answer?

A. That is the point. That is exactly the way I answered before.

Q. I see. Further: (Reading:)

"When did you first feel you had recovered from the accident and could stand up and teach?

112 "Answer: I never felt I could stand up during a whole lecture and teach. I would have to sit down.

"Question: Up to the present time?

"Answer: Up to the present time. Now, I probably could."

And this deposition, for your information, was taken February 19, 1955. So in that you claim --

THE COURT: Did you give those answers?

THE WITNESS: Yes.

* * * * *

113 Q. (Continuing) -- what, within your knowledge -- Now, don't give us what any doctor said, because I want just within your knowledge. What was, within your knowledge, the disability for which you were getting a pension? A. The disability was that I, it was very difficult for me to stand in front of a class and lecture.

Q. And that was the disability that you were getting payment from the Government for? A. Well, the disability was, it was difficult to walk, even; but I was thinking about employment.

Q. And was your claim with the Veterans Administration with reference to disability of your legs? Was that disability concerning this accident? A. Yes.

* * * * *

114 Q. * * * * When did you arrive in Florida the first time?

A. October 1st.

Q. Of what year? A. 1955.

Q. And when did you get your first position there? A. January; January 2nd, I believe it was.

Q. Of what year? A. Nineteen-fifty- Oh, no; that was 1956.

Q. Did you make any mention to any of the organizations, persons, colleges or universities that you contacted down in Florida, did you make any mention to them of the accident and any resulting physical disability?

115 A. No. I say, I would be foolish if I did that. I wouldn't get the job.

Q. Professor Christie, you testified concerning summer school at American University, and you also testified that you had told or had some conversation with someone at American University along the line that you were not going to continue there. A. Yes, I did.

Q. Well, now, -- A. That doesn't -- Go ahead.

Q. I want you to reconcile this: If you had discussion with them concerning not continuing there, how was it, then, that you had thoughts about summer school there? A. Because that is the usual way it is done. They don't, simply because you are thinking of leaving in September doesn't mean that you are not going to get summer school if they have enough registration. That is the usual way in all colleges. Your year goes on for the summer school, until September.

Q. Well, what discussion did you have concerning summer school? A. I asked them whether they were going to have a summer school, and they said yes, and if there was enough registration, they believed they would have some classes in advertising and marketing, but they didn't know what the registration was going to be.

116 Q. Did you have any definite commitment with them? A. No definite commitment; only that way, that if there was a registration, it looked as if I might get the classes in marketing and advertising.

Q. And did you express a willingness to take those classes? A. I didn't say no.

Q. Did you say yes? A. Well, they didn't, they hadn't, they didn't know whether they were going to have them.

Q. Did you express a willingness to take the classes if they occurred? A. I said I would like to have summer school classes, yes.

Q. And to whom did you say this? A. I am not sure whether it was Mr. Bailey or Mr. Levin. I am not sure who it was. It was just

an offhand remark. One afternoon I was talking, and I said I would like to get summer school classes.

Q. Was there any discussion about the compensation? A. No, but the usual compensation --

Q. Just a moment, Professor. You said no, is your answer?
A. No.

117 Q. What was the usual compensation, if you know? A. Well, I mean in other universities, --

Q. If you know, with reference to American University, what was the usual compensation? A. I don't know what American University did, but I know that --

Q. Just a moment.

THE COURT: Don't go beyond the question. Your counsel can take up whatever is necessary on redirect.

BY MR. RICHARDSON:

Q. So then, you did not know -- A. I did not.

Q. (Continuing) -- how much money -- A. No.

Q. (Continuing) -- you would be paid for what duration with reference to summer school? A. No. I didn't even know whether I was going to have summer school.

* * * * *

118 Q. I see. Now, you testified that you had stomach pains, that they started about a year ago, shortly after you arrived in Florida. A. Not shortly after I arrived. I had them for about a year, --

Q. From what date? A. (Continuing) -- to the present date.

Q. From about a year ago until today -- A. Yes.

Q. (Continuing) -- you had the stomach pains; is that correct?
A. Yes. And I went there in October.

Q. October. So, about November of last year you started to having the stomach pains; is that correct? A. That is right.

* * * * *

120 THE REPORTER: (Reading)

"What, with reference to your physical condition, do you

attribute to the accident?"

THE WITNESS: Anything at all, do you mean?

MR. RICHARDSON: Answer the question.

THE WITNESS: Well, I attribute the nervous tension completely to the accident, and that brought on the ulcer, because I have been in an extremely nervous state ever since the accident. The shock of the accident gave me a very great nervous shock, and it affected me a great deal. Since that, because of my loss of earnings, I have had a great deal of nervous tension also, which increased it, and I still have it.

BY MR. RICHARDSON:

Q. Is there anything else? A. Well, that is the, I would say is the greatest thing. I do think also that my spine was injured when I fell.

121 Q. Anything else? A. No.

* * * * *

126 REDIRECT EXAMINATION

* * * * *

THE COURT: Read it to the jury. It speaks for itself.

MR. WALSH: Well, all right. This is the text of an advertisement placed by Mr. Christie in the American Association of University Professors Bulletin, Volume 40, No. 2, Summer 1954, at page 345:

135 "Business Administration or/and Journalism: Professor of Advertising, Marketing, Market Research, Public Relations, and Sales Promotion. Extensive practical experience with several large New York organizations of worldwide reputation, and nine years' university teaching experience. Consultant. Considerable placement work with students."

BY MR. WALSH:

Q. Mr. Christie, did you place that advertisement? A. I did.

* * * * *

136 Q. Was this advertisement placed before or after the accident?

A. That was the summer, 1954, so it was after the accident, then -- if that's the summer. Is that publication the summer?

Q. This is the summer issue. A. It doesn't say what month,

does it?

Q. No. A. Well, then, it was after the accident, I should judge.

Q. Mr. Christie, Mr. Richardson showed you copies, photostatic copies of letters, correspondence regarding your requests for employment, both before and after the accident. Do these comprise all of the written efforts you made to get a college job? A. Not all of them.

Q. Do you now or did you at any time have copies of the letters you wrote or the originals of those you received? A. I have copies of all that I wrote, but I couldn't find all of them.

* * * * *

139 THE COURT: All right, go ahead. Read them all.

MR. RICHARDSON: And give the dates.

MR. WALSH: There are no dates on page 3.

THE COURT: Start reading.

140 MR. RICHARDSON: Start with page 1, Mr. Walsh, and read right on through to page 3.

MR. WALSH: Well, they are separate matters. Page 3, Defendant's Exhibit No. 2 for identification:

Georgetown University, George Washington University, the University of Virginia, University of Tennessee, Catholic University, University of Florida, Rensselaer Polytechnic, Hawaii University, University of Arizona, Boston University, Japan International Christian University, Sofia University; University of Bergen, Norway; University of Edinburgh, Scotland; University of Detroit, Arizona State College, University of the Pacific, Claremont Men's College, Pomona College, San Diego State College, San Francisco State College, Stanford University, University of California, Whittier College, University of Redlands, Florida State University, Stetson University, Rollins University, University of Miami, University of Tampa.

Some of the other places, non-college, applied to for employment by Mr. Christie:

American Marketing Association, National Council for

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Schools and Colleges, Journalism Association, University of Kansas, Baltimore Teachers' Agency, Adams Teacher Agency, College Public Relations Association, Public Relations for Business, American Chamber of Commerce, Washington Board of Trade, Delta Epsilon Alumni Group, Yale Alumni, National Cathedral, Bank of International Settlement, Riggs National Bank, National Bank of Washington, Security Trust Company, Wells Church Fund Raising, McGraw-Hill, Curtis Publishing Company, FOA, Domestic and Foreign Commerce, Agricultural Department, United Travel Company, Thomas Cook, Washington Daily News, Evening Star, Washington Post, American Express, Larabee Associates, J. Walter Thompson Company, American Trucking Company, Association of American Railroads, Air Transport Association, TWA, Pan American, American Express, Mutual of Omaha, Red Cross, American Bankers Association, Financial Advertisers and Public Relations Association, State Bank Organizations, Information Service of Government.

BY MR. WALSH:

Q. Mr. Christie, were any of these places on this list which I have read, here in the District of Columbia? A. A great many of them.

Q. Did you make personal calls -- A. Yes, I made personal calls.

Q. (Continuing) -- on some of them? Mr. Christie, what was the name of the man in Portland, Maine, who was helping you to get a job? A. Mr. Thayer.

142

Q. Do you have any correspondence relating to that? A. I did have, but it was all personal, and I tore it up before I knew you might want it.

Q. Did you discuss your desire and efforts to obtain a teaching job with Dean Bentley of the American University? A. Yes, I did.

Q. Now, from your experience as a college teacher, was this a usual or an unusual number of letters to write for a job of teaching?

A. Well, the usual way, the reason for writing all those letters is to find

the opening. You can't go ahead with looking for a job until you find the opening, and that is why all those letters were written. It is difficult to find the opening.

Q. You testified in answer to Mr. Richardson's question that when you wrote for certain jobs following the accident, you did not mention in your letters the accident or its consequences. A. No.

Q. How were you feeling at that time, physically, at the time you were writing these letters? A. I wasn't feeling too good, but I had to get a job.

Q. Well, why did you write these letters for a job if you weren't feeling physically well? A. Well, I say, I had to get a job.

143 Q. Well, why did you have to get a job? A. In order to live.

* * * * *

145 MR. WALSH: Will you read the question, please.

THE REPORTER (Reading): "Question: Right now, Mr. Christie, could you hold down a job as a college professor in your present --" and then it was broken off.

THE COURT: You mean in his present --?

BY MR. WALSH:

Q. (Continuing) -- in your present condition, physical condition. A. Some days I feel as if I could, and other days I feel as if I can't. It depends on your nervous condition.

* * * * *

RECROSS EXAMINATION

BY MR. RICHARDSON:

* * * * *

146 Q. So, January 1956 was your first employment since the time of the accident. A. Yes, that is right.

Q. Is that correct? A. That is correct.

Q. And from a period of time prior to the accident, up to and including January of 1956, you had been making these attempts to get employment, is that correct? A. When? When did you say?

Q. From a time prior to the accident, -- A. Yes.

147 Q. -- March, to be more specific, -- A. Yes.

Q. -- up to and including January of 1956, you had been making attempts to get employment? A. Yes.

Q. Through correspondence? A. Yes, through correspondence and also --

Q. And through personal calls? A. And through personal calls.

Q. Is that correct, sir? A. That is correct.

* * * * *

149 Q. And after that you were released and discharged from the hospital, and you could not get around without assistance and without going in taxicabs for a month and a half thereafter. Isn't that correct?

A. That is right. That is correct.

Q. Now, during that period of a month and a half in your home, did you write any of these colleges and organizations in your effort to

150 obtain employment? A. Oh, yes, I did.

Q. Why did you write colleges when the season was past? A. Oh, well, you still have the hope of getting in.

Q. Only the hope? A. You see, a great many -- I wouldn't say a great many; some colleges have vacancies suddenly from death and for other reasons, where a professor leaves suddenly, and so you still have the hope that there may be something .

Q. Well, then, there is a possibility after June of getting located in a college? A. There is a possibility, but it is very small.

Q. And that was your reason for writing during that period?
A. Yes.

Q. Now, thereafter did you pursue your efforts to obtain employment in colleges, after the month and a half at home when you were partially immobilized and before the time you could get up and get around without going in taxicabs? A. I did, but it was, kept growing less and less, and went to other organizations, such as those Mr. Walsh read.

* * * * *

151 Q. Then, some of those applications were made in the spring of '55, then, is that correct? A. Yes, they were. See, I wrote to some

of the same colleges the second time, to find whether an opening had
152 occurred since. It is all for --

Q. Well, did you feel then that if you got a position you could perform the duties of the position? A. Well, that was always a question in my mind, whether, in my nervous condition -- It was getting worse.

Q. Then you finally got employed in January of this year?
That's '56. A. Yes.

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158

DR. ROBERT C. RUSH

was called as witness and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

160

BY MR. WALSH:

A. *** He was admitted to the hospital, where he remained until June the 30th, 1954, and was treated with various dressings in an attempt to prevent and control infection in the wounds of the lower legs. The wounds on the right lower extremity seemed to come along quite readily. On the left lower extremity, however, the pressure caused a large hemorrhagic blister to form, and this blister was opened, and he was treated with a special ointment, and supportive dressings in the form of elastic bandages to support the circulation to the extremity.

Following his discharge from the hospital, he was treated in the office at first at rather frequent intervals, at which time the wounds were redressed and various medications were used on the wounds. It was necessary for him at first to be on crutches to aid in support of the extremities in walking, and then the use of a cane. The additional support of crutches and cane took about a month.

These dressings continued through the early part of 1955. About that time, the wounds on the right lower extremity were doing quite well. However, the wound of the left lower extremity, while the area of, the open area had gotten smaller, there was still considerable opening in the wound at that time.

He was last seen, as far as active treatment goes, on April 1st, 1955, and he was not seen again until November the 19th, 1956, for examination at that time.

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The examination of November the 19th, 1956, showed that the wound on the right lower extremity was completely healed. The wound on the left lower extremity, there was still a small weeping area on the lateral side, and the patient stated that this was repeatedly irritated by either socks or trousers as they rubbed over it. The skin over the area which had been open, the large area, was quite hard and

crusty, and did not give the appearance of normal skin. It was felt that there was still a diminution of circulation to the skin over the wound.

The left lower extremity was smaller in circumference than the right. The skin on the right side was also discolored, but not to the degree that that on the left was.

The patient also had other complaints at that time: that he felt his posture had become steadily worse since the accident, and also he recently had been hospitalized in Florida for a stomach ulcer. It was my feeling particularly with reference to the wounds of the lower extremities that he still had some disability on the left, and that he probably would continue to suffer from weakness in the extremities, due to circulatory damage of both lower extremities.

* * * * *

162 Q. Is it usual for this condition to persist for two and a half years following its original cause? A. Well, it has persisted that long, and the damage, the soft tissue damage was quite extensive. So it would not, does not surprise me that it has persisted that long.

Q. From your examination, were you able to determine the cause of this injury to the extremities? A. Well, the cause was that given in the history, that the patient had been knocked down and run over by a truck.

Q. But other than his description of what had happened, were you able to determine from your examination of the extremities what type of contact was made that caused that type of injury? A. Well, in general,
163 it would be a pressure force; I mean, a force driving directly -- in other words, impinging the soft tissues between the force and the bone; in other words, just squeezing.

Q. Doctor, could that injury that you found on June 8th be caused by a body falling to a pavement, and the contact with the pavement and the extremities alone, without any foreign -- A. I would doubt if just falling from his standing position.

Q. There would be absent the pressure that you have mentioned?

A. That is right.

Q. Would an automobile or a truck wheel be the type of pressure --

A. That would fit into the pressure, yes.

Q. How often did you see Mr. Christie while he was in the hospital? A. We saw him at least once a day while he was hospitalized.

Q. And do your records indicate how long he was hospitalized?

A. Yes, sir. From June the 8th to June the 30th, 1954.

164 Q. Following his discharge from the hospital, you advised and ordered supports, crutches and cane? A. Well, I did that while he was in the hospital and for the early part of the time following his discharge.

Q. Yes. And how long following the discharge would he require support or aid in walking and in transporting himself? A. In the form of crutches and cane?

Q. Yes. A. Roughly about a month.

Q. And then, following that, would he have free and convenient movement under his own power? A. Well, movement was always difficult, of course. When you have both legs damaged, it does limit your activities.

Q. And you were seeing him regularly, were you not, Doctor, at your office? A. Yes, sir.

Q. And how long did this condition persist, his difficulty in transporting himself under his own power without aid? A. Well, you mean, in other words, his getting around?

Q. His getting around without help, yes. A. Well, he was under rather active treatment from the time of injury up until April of '55, during which time, of course, his activities were increasing; but even
165 at that time he was, I would say he was below normal activity, or should have been.

Q. From your examination of the patient and his injuries, were there any indications that he was suffering pain? A. Oh, yes. He complained of pain repeatedly through here. Open wounds of this type are most frequently painful.

Q. Does that apply also to pain in walking? A. Yes.

Q. Caused by -- ? A. Caused by movement of the tissues in these open wounds.

Q. Doctor, did you render Dr. Christie a bill? A. Yes, sir. The bill has been rendered for \$325 for total care.

Q. That is, what does that include, Doctor? A. That includes his hospital care and office visits.

Q. Those visits every day to the hospital and at least once a day?
A. Yes, sir.

* * * * *

Q. Doctor, you spoke of circulatory damage. Will you explain that, please? A. Well, the normal circulation to the skin in the area of the wounds was impaired by the pressure, which of course accounts for the opening up of these wounds for the formation of the blister, and for the persistence of the open ulcer on the front of the leg.

Q. Well, what is the effect of a circulatory damage? You have explained what it is. What is the effect on a person? Is there any physical sensations or pain or inconvenience? A. Well, the results of it do cause the physical sensations of pain, due to exposure of nerve endings in the open wound.

Q. And is there any permanent damage resulting from circulatory damage? A. There would appear to be in this particular instance, due to the changes in the skin, which are still persistent in both legs, and the persistence of a small draining area on the left lower extremity.

Q. When you examined Mr. Christie on November 19th, did you find any swelling of the legs? A. The only mention I have here is that the left lower extremity was smaller than the right lower extremity,

167 at the level of the wounds.

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BY MR. WALSH:

Q. Doctor, following Mr. Christie's entrance into Georgetown Hospital on June 8th, was his condition such that he was required to stay in bed and couldn't get up? A. Yes, initially, yes, sir.

168 Q. Do you know if he had any difficulty in sleeping? Do you know if he had to take sleeping tablets in order to sleep? A. Most traumatic patients do, due to the excitement. I don't have it specifically, but I imagine he did.

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Q. From your observation and treatment of Mr. Christie, and your experience, would you be able to say whether the injuries that you have described will result in an impairment of Mr. Christie's abilities to lead a normal life, so far as work is concerned, everyday work? A. I would feel that they would impair one in an occupation which would require you to be on your feet considerably.

Q. Would you or have you advised Mr. Christie against being on his feet more than necessary? A. I would.

169 Q. Would you say that a job which required walking every day would be in the best interests of -- to his advantage in terms of safeguarding and preserving his health? A. I would say that standing or walking would be, would not be indicated in his care.

Q. Doctor, from your experience, would a man sixty-three years of age, who had suffered the accident indicated by the injuries you observed on Mr. Christie, suffer shock? A. He could.

Q. And if he did, would it be probable that he would be nervous as a result of this experience, this injury? A. Not necessarily.

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CROSS EXAMINATION
BY MR. RICHARDSON:

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Q. With reference to the ulceration, is the type of ulcer which you make reference to the same as the duodenal ulcer? A. No, not directly, no.

Q. In other words, the type of ulcer you make reference to, is it the bleeding type like the duodenal? A. No. I am speaking specifically of the ulcer on the leg which was due to lack of circulation.

170 Q. That is what I mean. It is not the bleeding type, such as the duodenal, then, is it? A. It can be. It can bleed. It is a different, a mechanical type ulcer, however.

Q. Is it considered, within your knowledge, to be as dangerous a type of ulcer or as bad a type of ulcer as a duodenal? A. Not in general, no.

Q. Do you have a specific recollection of Mr. Christie's posture at the time of your first seeing him? A. Yes.

Q. (Continuing) -- on his feet? A. Well, when we first saw him on his feet after the injury.

Q. What would be your description of his posture at that time? A. Generally very much as it is today. There may be some accentuation, that is, in the upper back, but not a very great change.

Q. And could that not be a result of advancement in age? A. Yes, it could be.

Q. For a person of his age? A. It could be.

171 Q. Now, Doctor, I don't believe you have given your estimate as to the disability on the part of Mr. Christie. A. You mean percentage-wise?

Q. Yes, sir. A. No, I haven't.

Q. Would you be kind enough to give that, if you feel that you are in a position to give it? A. (No response)

Q. If you are not at this particular time, -- A. No, I don't --

Q. If you are not at this particular time, -- A. No.

Q. (Continuing) -- it is all right. All right, sir. Now, at the time of your first examination, did you observe anything, any difficulty, any physical difficulty with reference to any other part of Mr. Christie's body, other than his legs? A. No. He had no record. (Looking at records, as before)

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173 Q. Now, kyphosis; what is kyphosis? A. Kyphosis is a rounding of the back in this position. (Illustrating) In other words, an increase of the normal curve of the spine.

Q. And you did notice that at the time of your examination, your first examination, didn't you? A. Yes.

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174 Q. *** Now, you make reference to circulation. You, I think, stated that there was a deficiency in circulation. A. Yes, sir.

Q. Is that correct, sir? A. That is correct.

Q. Did you examine Mr. Christie at any time before this accident? A. Never had, no, sir.

Q. Then you wouldn't be in a position to state whether or not there was any circulatory deficiency before the accident, or would you? A. No. Let me make one point clear on that. I am speaking specifically of circulation in relation to these injuries and the formation of the ulcers. I am not talking about his general circulatory condition.

Q. I see. But nevertheless, you have no observations to make about his general circulatory condition prior to the accident, do you? A. No, I do not.

Q. I see, sir. Now, with reference to the legs. You have stated that one leg was larger than the other. Did you -- Well, we will cover

everything this way, Doctor: Had you examined Mr. Christie for anything or in any way prior to this accident? A. No, had not.

175 Q. So then, therefore, you can't say whether or not one leg was larger or smaller than the other, prior to the accident, can you?

A. No.

Q. Now, with reference to the injuries to his legs, what would be your observation with reference to this: Would walking be a greater strain upon him physically than standing? A. Walking would be a greater strain.

Q. Would be a greater strain? A. Yes.

Q. Now, as of what time, Doctor, within your recollection, would you say would have been the first time, the earliest date that Mr. Christie could have again, from a physical standpoint, resumed the occupation of a lecturer? A. A school teacher lecturer?

Q. Yes. A. I would say somewhere late in the fall of '54.

Q. Sometime late in the fall of '54? A. December; November, December.

Q. Thank you, sir. Now, further with reference to shock. Was Mr. Christie in a state of shock at the time you first examined him? and if so, to what extent? A. Very mild.

176 Q. Very mild. A. Yes.

Q. And when, if your visits permit you to make a statement on it, when would you say was the earliest time that he had recovered from that mild shock? A. That would be within the first day.

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REDIRECT EXAMINATION

BY MR. WALSH:

Q. Did you furnish me at my request with a report of your examination of Mr. Christie on December 16, 1954? A. Yes, sir.

Q. And did you state in that letter to me, in that report, rather, the very last sentence: (Reading)

"He probably will always have some disturbance from the extremity, due to the circulatory change."

A. Yes, sir.

Q. And has your examination of Mr. Christie, subsequent to that date, caused you to change your report with respect to that statement? A. No, sir.

Q. This most recent report which you furnished me at my request, dated November 19th, in the last paragraph, impression, with
177 particular reference to the wounds of both lower extremities, due to the crushing, I ask if this word "crushing" is the same as the explanation you gave with respect to pressure. A. Yes, sir.

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BY THE COURT:

Q. How large was this ulcer on the left leg when you saw it last?

A. When I saw it last?

Q. Yes. A. In November of 1956 there was just a very small ulceration, about the size of the end of, the eraser end of a lead pencil.

Q. Now, you stated that standing or walking would not be indicated. Did you mean by that that he should be immobilized? A. No, no. I meant by that, a occupation in which that was the principal duty, such as, well, a postman or a policeman, an occupation in which walking or standing was the principal activity.

178 Q. I see. You didn't mean that he shouldn't walk or stand?

A. Oh, no, sir.

Q. Now, you said you found no fractures on either leg. A. That is right.

Q. Did you find any damage to the bone structure? A. No damage.

Q. Did you find any damage to the ligaments? A. In the area in the front of the leg, the pressure, damage to all the soft tissues, but not to the supporting ligaments of the joints above or below the involved area.

Q. They weren't torn? A. No, sir.

Q. Or crushed? A. No, sir.

Q. Now, this diagnosis of lack of circulation in the area of the wounds, you came to that conclusion because of the fact that the wounds didn't heal as rapidly as you expected? A. Two ways: one, they did actually open while under treatment, and then did not heal. When we first saw them, there were more contusions, more bruises, but they actually just opened as the hemorrhagic situation became too much for
179 the leg; the skin was just broken off the top of the blister.

Q. You didn't determine it by any mechanical or laboratory test?

A. No, sir.

Q. Would a blood pressure machine show anything on this?

A. I don't think so.

Q. Did you take his blood pressure? A. His blood pressure was taken at the hospital.

Q. But you don't think that would have any significance so far as the circulation in the area involved is concerned? A. No, I don't think it would have any real bearing.

Q. That circulation would be localized? A. Local to the area, yes.

Q. And you didn't come to any conclusion as to arteriosclerosis?
A. None; not relevant to the injury itself, no.

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181

DR. JOHN C. SULLIVAN

was called as a witness and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WALSH:

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182 A. Mr. Richard B. Christie was first seen and examined by me on the 19th of November, 1956, at my office. (Looking at records) And, if I may refer to my notes, -- ?

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183 MR. RICHARDSON: No objection, Doctor.

A. (Continuing) (Looking at notes) Mr. Christie, at the time I first saw him on the 19th of November 1956, gave a history of having a gnawing type of pain and distress in the upper abdominal area for the past six months, the pain appearing approximately two or three hours after meals, and relieved somewhat by eating, but having recurrence of a sensation of fullness and producing discomfort also after eating occasionally immediately. This train of symptoms, together with occasional pain and distress, occurring at one or two in the morning, together with occasional nausea and vomiting, has persisted almost constantly every day for the past six months.

He was hospitalized at the Winter Park Memorial Hospital, Winter Park, Florida, on the 19th of October 1956, and was under the care of a Dr. Ramsey at that time. He consulted Dr. Ramsey because he had noted very little relief of this pain and discomfort in the abdomen, and had noticed a progressive weakness and tiredness from the first week in October, together with the fact that he had developed a severe respiratory infection, necessitating his consulting with Dr. Ramsey. At that time that he first saw Dr. Ramsey and was hospitalized, laboratory and other examinations revealed that he was suffering from a rather severe anemia. The cause of the anemia was ultimately

184 determined to be due to an active duodenal ulcer which caused bleeding from the gastrointestinal tract, and the subsequent anemia.

THE COURT: This is all what he told you, Doctor?

THE WITNESS: Yes, that is correct.

A. (Continuing) During his stay in the hospital, he was given appropriate treatment for the duodenal ulcer, which was discovered,

as I mentioned before, by fluoroscopic and X-ray examination. In addition to this, he was given three whole blood transfusions, and he felt much better following the transfusions, and his abdominal symptoms which he had had for the past six months were abating.

He told me that he was discharged from the hospital on the 14th of November, five days prior to his seeing me, and he was given a type of program to follow, including medications, by Dr. Ramsey, together with a dietary regime.

On examination by me on the 19th of November 1956, the examination consisted of the following. There was a well healed scar in the right groin area, which was due to repair of a hernia several years ago in Kent, Ohio. There was tenderness on palpating in the right side of the mid-portion of the abdomen just below or beneath the right lower rib margin. There were no palpable organs or masses.

A plain or flat film of the abdominal area by X-ray revealed no significant abnormalities.

185 The next examination was the fluoroscopic and X-ray film examination of the upper portion of the gastrointestinal tract, which includes the esophagus, stomach, duodenum, and the upper part of the small intestine. The stomach was revealed to be normal in size, shape and position. There was a moderate spasm as seen under fluoroscopy of the pyloric or the outer, lower portion, outlet part of the stomach, and on fluoroscopy and on the film examinations there could be seen a small ulcer crater on the films located near the base of the duodenal cap, on the lesser curvature side. This was located at or near the same location that Dr. Ramsey had described in his notes to Mr. Christie.

That ulcer crater measured approximately one half centimeter in diameter, and during the fluoroscopic examination, there was again noted tenderness over this area. The stomach emptied out well. There was no evidence of obstruction.

The blood picture, on the 19th of November, revealed a hematocrit value of 38 per cent, which is just a few percentage points below normal.

The previous hematocrit value when he was admitted to the Winter Park hospital was 20 per cent, which indicated a rather severe degree of anemia, due to blood loss.

Mr. Christie further stated to me that he had lost approximately 20 pounds in the past five weeks.

My conclusions at that time were: Duodenal ulcer, active; no
186 evidence of ulcer of the stomach or other abnormalities within the abdomen; and, three, no evidence of a previously healed ulcer of the duodenum which would have manifested itself by a residual deformity of the duodenal cap.

BY MR. WALSH:

Q. Doctor, what are the usual symptoms of this duodenal ulcer?

A. The usual symptoms are those related to usually mealtime activity. An individual with that type of an ulcer will have distress, pain or discomfort in the upper portion of the abdomen, occurring usually two to three hours after meals, when the stomach is usually empty, and is relieved somewhat by eating or taking anti-acids.

Q. Doctor, is this a painful sensation? A. Yes, it is a very uncomfortable, it is an annoying and a nuisance type of sensation. It makes an individual --

Q. When you say nuisance, -- A. (Continuing) -- uncomfortable.

Q. (Continuing) -- does this interfere with the normal activity of a person, normal everyday activity, his work? A. It can, yes. It can make them feel mighty uncomfortable, and it distracts them from their attention to their ordinary activities and daily work.

187 Q. Was the condition that Mr. Christie had, called sometimes a bleeding ulcer? A. That is correct. It is a duodenal ulcer with bleeding. That is a complication of an ulcer. That is one of the complications.

Q. So a duodenal ulcer may not be a bleeding ulcer? A. That is correct.

Q. And a bleeding ulcer is a further aggravation of the condition?
A. It is a complication of a duodenal ulcer or a peptic ulcer of the stomach or duodenum.

Q. And how and why does such an ulcer develop to the condition of being a bleeding ulcer? A. Well, a bleeding occurs because the ulcer has eroded to a depth enough in the stomach or duodenum to permit the exposure of a blood vessel and erode right through it so that there is no protection for it, and it bleeds, similar to a real severe abrasion to the skin. If it takes the top layer of skin off, then we know that there is oozing and bleeding, and if it goes deep enough, of course, the bleeding can be severe.

Q. How long does this take to become a bleeding ulcer? A. That is difficult to say. If an ulcer goes untreated, it may occur rather abruptly after a few hours of having symptoms of this type of distress or discomfort, or it may occur after several months. In other words,
188 there is no cut and dried time.

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Q. What other symptoms would there be? A. Well, those of a bleeding ulcer would be those relative to the loss of blood over a period of time. If the bleeding is the oozing type, like, say for example a leaking faucet, the patient may not be aware of it, and the symptoms of blood lost may appear gradually: that is, progressive weakness, easy fatigue, no ambition, no desire to do anything except lie down and rest.

In an acute blood loss, of course, the manifestations then would
189 be those of shock. The patient would collapse, unable to arise; his skin would be cold, clammy, blood pressure low, pulse rapid, thready, and the patient would need immediate replacement of the blood lost there, because of the large volume lost in a rather short time, contrasted to a slow leaking type of affair.

Q. Another person then would observe that the patient was pale? He would be pale? A. Yes, if the blood loss has continued for, say, if it is a continuous loss of blood through the bowel, the individual himself may not be aware of it. It is often friends or relatives or someone to whom they are talking will say, "You look pretty pale."

Q. Does a hematocrit blood count of 20 per cent indicate severe anemia? A. Yes, quite severe.

Q. A great loss of blood? A. Yes.

Q. And would it be reasonable to expect that the treatment of that would involve as many as four blood transfusions? A. That is correct, roughly three, four; or, if the blood loss continues, it will, of course, require more.

Q. And would it require hospitalization? A. Yes, sir, correct.

190 Q. Is this in any way related to age? Would an older person require more extensive treatment or respond less rapidly or quickly? A. By and large, yes.

Q. Well, then, if a man sixty-five years of age, approximately, had this condition we have just described, 20 per cent hematocrit, and was hospitalized for it, would it be reasonable to remain in the hospital for such treatment about twenty-six days? A. Yes, that is average. From three to four weeks is the usual requirement for the management of this type of case, I would say.

Q. When you examined Mr. Christie on November 19th, you found that he still had the ulcer? A. That is correct.

Q. And that this ulcer was active? A. That is correct.

Q. Would you describe what you mean by active? A. Well, the ulcer appears on the fluoroscopic examination and also upon the film examination, appears as, the best way, probably, to describe it, if you have a, you dig a little hole, say about an eighth of an inch deep, and drop this barium material in it, it will appear on the films as a little round or oval shaped affair, containing the barium; and that is called a crater, and ulcer crater. And over this area, on fluoroscopic
191 examination, there was noted tenderness; and also it was noted when I first examined the abdomen, before the fluoroscopic examination.

Q. Does the word "active" indicate any activity, something that is dynamic or has a -- A. Yes. It indicates that there is still some activity insofar as the ulcer has not healed completely. In other words,

the lining of the stomach, just like the person who has an abrasion of the skin torn off, when that begins to heal there is a scab formed, and later the new skin forms underneath, and the scab is extruded, a similar process, basically, within the gastrointestinal tract, the lining tries to rebuild. And also there is, if the ulcer is deep enough, there will be scar tissue formed as you do when you get a real deep cut and the scar is formed.

Now, there was no evidence of this type of healing in this ulcer, no evidence of the disappearance of it from the previous description afforded us by Dr. Ramsey from Winter Park. It is still there. It was still there the 19th of November.

Q. Now, considering the parallel of the abrasion, an abrasion, of course, ordinarily would be caused by some force, some outward force, -- A. Yes, sir.

Q. (Continuing) -- some foreign force. What would cause this
192 type of abrasion in the interior of the body, the stomach or the duodenum? A. Well, for many years now, we have known that, and it has been quite well documented that there is a definite relationship between ulcer formation -- that is, I am referring to peptic ulcer formation of the stomach or duodenum -- and emotional tension: stress, strain, and that type of activity.

Q. Now, Doctor, from your experience and your observation and your examinations of Mr. Christie, and assuming that a man sixty-five, sixty-three, -four, and -five, running through that period of his life, experienced an automobile accident, as a result of which he suffered severe injuries to his legs, and he was thereby disabled from pursuing his profession, that of a college professor; and further, that he was unable to secure any employment, as a result of all of which, and the added fact that he had no independent income, he was reduced to financial circumstances that we can best describe as being stony broke, and having to worry about day to day living expenses, keeping body and soul together, and that this condition persisted month after month for well in excess of a year, without any amelioration or any immediate hope

of bettering the financial condition or paying the indebtedness which was incurred in living; would this result in the type of emotional stress and
 193 harassment and frustration which would be the cause of the condition that you have described, the duodenal bleeding ulcer? A. Yes, I would say so. It could certainly produce that type of picture, in the circumstances that you relate.

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194 Q. In the condition which you observed on November 19th, of Mr. Christie, what treatment did you prescribe for him? A. I recommended that he continue with the medications that Dr. Ramsey had originally prescribed, and that it probably would be best if he were permitted to continue on a rest type of medical regime to permit complete and thorough healing of the ulcer, inasmuch as it still was present on the films.

Q. And diet? A. That is correct.

Q. So that, in short, to ameliorate his condition and to work toward an ultimate solution of it, he should have rest and a regulated diet? A. That is correct.

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CROSS EXAMINATION

BY MR. RICHARDSON:

195 Q. Dr. Sullivan, will you be kind enough to read to the Court and to the jury the first sentence under "Comment" on page 2 of your report of 19 November 1956? A. Yes, sir. (Reading:)

"Comment: Historically, there appears to be no causal relationship between the injuries sustained as a result of the accident which occurred in June 1954 and the occurrence of the duodenal ulcer with bleeding in October 1956."

Q. Will you be kind enough to explain to the Court and the jury what you meant by that sentence? A. By that, I mean two things: first, the occurrence of an ulcer as a result of a type of injuries that Mr. Christie incurred, they were not to the abdomen, it didn't receive a direct blow; secondly, there have been well documented cases of ulcer occur following direct blow to the abdomen. This however, was not the case in Mr. Christie's accident, in which he suffered injuries elsewhere; and based upon the history of the injury, which was not to the abdomen, but to the other portions of the body, which I believe have been explained, --

Q. Certainly, Doctor. A. (Continuing) -- that the ulcer due to direct injury to the abdomen would have occurred very shortly after the accident. However, Mr. Christie suffered the ulcer in October, 196 approximately October, but dating back six months prior to October, the symptoms began at that time.

Q. Well, then, am I correct in stating, then, that that sentence means that the injury which he received, which he says that he received from the automobile accident, which I tell you, and maybe you already know, was an injury to his legs, -- A. That is correct.

Q. Am I correct in saying, then, from reading that sentence, that this duodenal ulcer which he told you he had first symptoms of in October 1956, am I correct in saying that within your opinion, that that was not caused by the injury to his legs? A. That is correct. That is what is meant by that, that the injury to his legs didn't cause the ulcer.

Q. Yes, sir,. Thank you. Now, you did say to the judge, as I recall it, to His Honor, that the history which was given to you was given by Mr. Christie. A. That is correct.

Q. And so therefore, you have no firsthand knowledge of your own with reference to when, through examination or otherwise, he first had symptoms of a duodenal ulcer, do you? You got that from him, didn't you? A. That is correct, and from Dr. Ramsey's report.

198 Q. I am asking you whether or not the ulcer was bleeding at that time. Did you find out from your examination? A. He had an active ulcer.

Q. But was it bleeding at that time; do you know? A. You couldn't tell, but his hematocrit was not normal.

Q. You couldn't tell, his what? A. His hematocrit value was not normal.

Q. That is, the blood value? A. Yes.

Q. Was not normal at that time? A. Was just a few points
199 below normal.

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200 Q. Now, then, you stated, as I recall it, that of course, blood transfusions can build up the blood value; they do. A. If the bleeding stops.

Q. That is right. And also the stopping of the bleeding can build up the blood value; isn't that correct? A. Well, the body has a normal mechanism by which it replaces lost blood cells, yes.

Q. And then, if there is a stopping of bleeding and the normal replenishment mechanism is operating properly, the body will take care of the building up? A. With a loss of approximately 50 per cent, though, it would be quite a strain and stress on the body, blood-building activity.

Q. But you didn't testify it was 50 per cent when you examined him.
A. Well, it was obvious, from 38 or 40 per cent down to 20 per cent.

201 Q. Yes, but at the time you examined him there was a very slight blood deficiency; is that correct? A. That is correct.

Q. Now, then, Doctor, you have stated that emotional tension or emotional upset has been traced, in study of such cases, as a cause of this type of ulcer. A. That is correct.

Q. And of course, when you say emotional tension, and emotional upset, you mean anything within the realm of the activity of a human

being that might cause that emotional upset and emotional tension, don't you? A. That is correct. Worry, --

Q. That is correct. A. (Continuing) -- anxieties, tensions, reverses of any type.

Q. That is correct. A. (Continuing) -- conflicts.

Q. Now, going back to the history again, your statement, then, in your report, that a duodenal ulcer of this type can be caused, can be the result -- Well, suppose you read your report from "However" on, under "Comment." I didn't mean to chop you off on the first sentence. Read the rest of it, please, sir? A. (Reading) "However, during the course of the history taking, Mr. Christie related that since the time
202 of the accident, he has been quite burdened financially, since for most of the time since the accident he has been unable to carry on with the professional work for which he has been trained. This has resulted in an increasing degree of worry, stress and strain in his attempt to make ends meet.

"In this connection, it is believed that there is a definite relationship between the worry, stress and strain, and the development of an acute bleeding type of duodenal ulcer and the persistence of it as of today," 19 November 1956.

Q. Yes, sir. Did you inquire of Mr. Christie, at the time he gave you this history, of any other activities or phases of his life, or is this what he told you and all he told you as a basis of that opinion?

A. He mentioned during the course of the conversation in the office that he had been in the economic teaching profession.

Q. Well, I think that is all covered here. But I mean, did you make inquiry of him with reference to his life in general, other than these matters that he related to you? A. Not in general, no. I asked him how he was getting along, and he said he wasn't able to make ends meet, as I quoted here.

203 Q. So you did not ascertain through your conference whether or not there was anything beyond this that could have caused emotional stress and strain, did you? A. In relationship to the accident, you mean?

Q. With relationship to the ulcer. A. No. He had been symptom-free as far as his stomach is concerned or was concerned, insofar as his activities all during his life up until six months prior to the hospitalization.

Q. He had been symptom-free? A. Insofar as the stomach was concerned.

Q. And where did you get that information from? A. He told me that.

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REDIRECT EXAMINATION

BY MR. WALSH:

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204 Q. (Continuing) - that your explanation was, the use, the choice of words, of language, of the statement that --

(Reading:)

205 "Historically, there appears to be no causal relationship between the injuries sustained as a result of the accident which occurred in June 1954 and the occurrence of the duodenal ulcer with bleeding in October 1956."

-- your explanation is that there was the one, the ulcer was not the result of the blows, the injuries received in the accident, the physical blows resulting in injuries to his legs was not the immediate cause of the interior abrasions in the stomach. A. That is correct,. Yes, that is what I mean to say in that first sentence, under "Comment," that a direct blow to the legs had no relationship to the causation of this ulcer.

Q. You did not mean to say, you did not mean by that that the ulcer and the cause of the ulcer was not related to emotional upset which was the result of these blows received in the accident mentioned?

A. That is correct. I didn't mean it that way.

Q. Now, Doctor, have you rendered a bill to Mr. Christie for your treatment? A. I don't know whether it has been received or not, recorded.

Q. How much is it? A. Fifty dollars.

Q. And has that or any part of it been paid? A. No, sir.

206 Q. Doctor, let me ask you a question with respect to charges for this type of treatment. Would it be necessary, during twenty-six days of hospitalization for a bleeding ulcer, would it be necessary to have X-rays? A. Yes, indeed.

Q. And would it be reasonable to have as many as nine in a period of twenty-six days? A. Are you referring to -- ?

Q. I am referring to hospitalization for twenty-six days for a bleeding ulcer. A. Yes, I would say so, to determine the cause of the bleeding, yes.

Q. Yes. And would a charge of \$90 for nine of them be reasonable and usual? A. Yes, that is reasonable.

Q. (Continuing) -- while in a hospital? And you have already testified that four blood transfusions during such a period would not be unusual. Would a charge of about \$80 for the four, including setups and blood, be unusual? -- would it be usual, rather? A. That is about the usual fee, throughout the country. Of course, if it is needed, it is given free and replaced later by the individual or his relatives.

Q. And as a consequence of this treatment, would there be any expenses incurred for laboratory and antibiotics? A. Yes, that is
207 standard procedure of doing repeated laboratory work to determine the blood status, from hour to hour or day to day.

Q. And during twenty-six days of hospitalization for a bleeding ulcer, would a charge of about \$33 for laboratory be usual? A. Yes, depending upon the number of blood tests that were done to determine the status of his blood to follow whether or not the bleeding had been stopped or not. That is the important point of doing those repeated blood examinations.

Q. And would a charge of approximately \$45 for antibiotics and drugs during a period of twenty-six days in the hospital be usual and reasonable? A. I would say that it is within the realm of reason.

Q. And for a general practitioner who treated a man for this condition and called on him in a hospital every day --

MR. RICHARDSON: Your Honor, I object to these questions. This witness has no knowledge whatsoever as to what treatment --

THE COURT: I sustain the objection.

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RECROSS EXAMINATION

BY MR. RICHARDSON:

Q. And now that we are talking about charges, Doctor, what personal knowledge do you have of what is and what is not a reasonable charge in the State of Florida, with reference to laboratory fees, blood transfusions, antibiotics, and the like? Do you have any personal knowledge of what is and what is not a reasonable fee down there?

A. Yes, sir.

Q. And how? A. I happened to be down there a while ago.

Q. You happened to be down there? A. Yes, to a meeting, and talking with some colleagues there in that area.

Q. And you found that from talking with colleagues? A. Yes.

Q. Did you go to the hospitals and inquire? A. I have been in several meetings and inquired.

Q. Did you then -- A. You mean the day he was in the hospital?

Q. No; I mean the time you say you got this information.

209

A. Well, that is where the meeting was, in the hospital.

Q. And did you get firsthand knowledge or from others as to what the cost of laboratory fees, blood transfusions -- A. What do you mean, firsthand knowledge? Ask the patient what he paid?

Q. No; go to the hospital and ask the hospital. A. That is where the meeting was.

Q. I know the meeting was at the hospital, Doctor. A. Well, I was in the hospital.

Q. All I am asking you, did you ask the proper person in the hospital, that assesses the charges for laboratory fees, what the laboratory fees are that Mr. Walsh has referred to, that type of laboratory fees? A. I saw a copy of one, of another patient, that was showed to me.

Q. Rendered by that particular hospital? A. No, not that particular one, no, but one in Florida.

Q. Where in Florida? A. In Miami.

Q. Well, can you testify that the charge in Miami was the same as where you were? A. No; I said it might be similar.

210 Q. Now, Doctor, you state that an accident such as Mr. Christie told you he suffered, and a lifetime experience such as Mr. Christie told you he experienced, in your opinion could cause this duodenal ulcer; correct? You just told Mr. Walsh that. A. Accident?

Q. Yes. Mr. Walsh further questioned you, because of my questioning of you, wherein you stated to my question that the accident in and of itself, in accordance with your report, was not the causal, did not cause this ulcer.

THE COURT: Now, he had an adverb in there; "historically." Then he described what he meant by this.

MR. RICHARDSON: Historically.

BY MR. RICHARDSON:

Q. And now you say that historically, or do you say historically now -- I presume you would have to say historically, because it is all from history, -- A. That is right.

Q. (Continuing) -- that the accident, plus the life experience that Mr. Christie reported to you, in your opinion caused this ulcer. Is that correct? A. I believe it is pretty well explained in this comment.

Q. Well, I thought it was, too.

THE COURT: Answer the question, Doctor, if you can.

211 THE WITNESS: In what way, Your Honor?

THE COURT: He just asked a question. Just say yes or no, or explain it. This is cross examination. A. This is the accident itself?

BY MR. RICHARDSON:

Q. Yes. A. There was no direct blow to the abdomen.

Q. That is correct. A. It did not, in my opinion, cause the ulcer.

Q. Thank you, sir. That is what I thought you said. In other words, you said, as I recall, that it was related to you historically from Mr. Christie as to the aftermath, his difficulty in getting employment and all that, which in your opinion caused the ulcer; the worry, the stress and the strain. Isn't that correct? A. That is correct.

Q. That is correct. Well, isn't it a fact, Doctor, that you not having observed this gentleman, he not even having been in the same town, you not having treated him at all, that this ulcer could have been caused by some other emotional strain, if he had some other emotional strain? A. Well, my point here is that emotional strain of any type, --

Q. Any type. A. I don't specify any one particular --

212 Q. In other words, you are not excluding any other emotional strain that might have occurred? A. No. I say in the next to the last sentence that as a result of an increasing degree of worry, stress and strain, and I believe that there is a definite relationship between worry, stress and strain, and the development of an ulcer.

Q. But there could be other emotional stress and strain which you knew nothing about, couldn't there? A. I didn't specify what the exact type of strain or stress or burdens were.

Q. Thank you.

MR. WALSH: That is all, Your Honor.

BY THE COURT:

Q. Doctor, you then attribute the ulcer to anxiety and concern and emotional upset? A. That is correct, Your Honor.

Q. You don't know what caused it? A. No, sir.

Q. But you inferred it was caused by financial worry? A. Could be. I believe --

Q. Well, did you infer that? A. That was one of the inferences in it, in Mr. Christie's history.

213 Q. Now, if that financial worry was removed, would that be good therapy for the difficulty? A. Well, I think certainly any type of security, Your Honor, is a big boon toward helping anyone get better.

Q. And you think that if the removal of the financial worry took place, that would be curative? A. I can't say curative, Your Honor. I would say it would help the man to improve.

Q. I think you said you prescribed continued rest, and medication, which would relieve the tensions. A. Well, that will help, too, but I don't --

Q. Well, I don't see how a man can rest and have his tensions relieved when they are caused by financial worries which cannot be relieved if he rests. Will you explain that to me? A. Removal of an individual from his surroundings of tensions and anxiety is one of the big features in the management of ulcer; and certainly, anyone who has had an acute ulcer and removed from his surroundings, even though he has to return to them at a later date, has effected a healing of the ulcer -- not using the word "curative."

Q. Well, wouldn't you recommend that he do something to relieve his financial worry? A. That would definitely help, I imagine, Your Honor, but there are things that are controllable and probably
214 things that are uncontrollable in the management of ulcer, and we try to exercise as much control over the controllable factors as possible in the management of ulcer, to offset the uncontrollable ones, which may be just temporary, or they may even be of a permanent nature.

Q. You understood this man had no money except what he earned, didn't you? A. That is correct.

Q. Well, do I understand, then, that you think that a relief from financial worries would be beneficial to him? A. If he can obtain

gainful employment, that would be a big factor in enabling him to resume activity after the ulcer has healed.

Q. Well, how can he obtain gainful employment, and rest as you say? or do you think the rest was only temporary? A. Temporary.

Q. Oh, I see. A. Until the ulcer healed, sir.

Q. Oh, I see. A. That is correct. Then, if he were assured gainful occupation, --

Q. It wouldn't recur? A. I believe so.

Q. I see. Did he tell you that he had been employed from about the first of the year until just before he went into the hospital in October,
215 and in gainful employment of about fifty dollars, the average of fifty dollars a week? A. I didn't ask him about that, Your Honor.

Q. Would that make any difference in your opinion? A. Well, if he were, if he felt secure in that position, I think that that would maybe make a difference.

Q. What would the difference be? A. Well, it would probably mean that there might have been other factors at work in production of the ulcer in connection with stress and strain, not only financial difficulties.

* * * * *

THE COURT: Well, how long would this period of rest require, in your opinion, before he could go back?

DR. SULLIVAN: I would recommend a minimum of three weeks, Your Honor.

* * * * *

216

DR. EVERETT J. GORDON

was called as a witness and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION
BY MR. RICHARDSON:

* * * * *

219 A. *** On examination at that time, it was noted that he walked with a halting type of gait with a very stooped posture, which he had stated had been present for many years; that is, he was bent over in sort of a hunched position. He had a marked kyphosis deformity, --

* * * * *

220 A. *** Examination of his legs showed a small ulcer on the left leg, which was one and a half by one and a half inches in size, surrounded by red and purplish skin, soft tissue. He had numerous superficial varicose veins of both feet and both legs -- that is, bilateral -- and with a brownish mottling of both legs below the knees. That is, the skin was discolored, the typical finding of what we call venous status, which means the impeded circulation, where it had been present for many years, probably, due to varicose veins, not proper circulation. This was the same on both sides.

He had some thickening of the right ankle, but this was probably due to an old fracture that is not related to the present injury.

He also had numerous rales, or, his breath sounds were irregular; they were not clear. This was due to an old bronchiectasis, which is a bronchial condition, which he stated had been present for some time, where the cough would bring up sputum constantly.

X-rays were made, and the X-rays of his left leg and ankle were entirely negative, as they had been on admission to the hospital. X-rays of his spine showed the severe kyphosis, or round back deformity, with hypertrophic changes; that is, changes of degeneration which follow when the bones are in a deformed position for a long time. He also had

221 marked hypertrophic changes, or arthritis, in his cervical spine, and the fifth cervical vertebra was displaced forward on the sixth.

* * * * *

222 A. *** Now, based on this examination and the review of the records at Georgetown Hospital, I came to the following diagnoses: contusions of both lower extremities, with an ulcer, chronic, moderate, of the left leg; secondary trauma, superimposed upon circulatory insufficiency.

* * * * *

Q. But did the X-rays disclose any fractures? A. No, they did not.

Q. Did they disclose any injury to the bone? A. No.

* * * * *

A. ***And then, other diagnoses, which are many, were: benign prostatic hypertrophy; that is, an enlarged prostate gland, which is quite common in older people. And chronic bronchiectasis, which is his chest condition, Hypertension, or high blood pressure, due to arteriosclerosis, or hardening of the arteries. Severe hypertrophic arthritis, with sub-luxation -- that is, partial dislocation -- of the cervical spine, old.

✱ ✱ ✱ ✱ ✱ ✱

223 A. ***From that examination, I felt that the injuries which he sustained directly from the accident of 1954 were those of his legs, and the right leg at that time had healed and he was having difficulty only with his left leg at that time. I felt that the chronic ulceration of

the left leg had persisted because of the poor circulation. At that time, I felt that he did have a partial disability of the left leg as a result of the chronic ulceration, but inasmuch as he was a professor or teacher, not a laborer, I felt that it would be insufficient to interfere with his type of occupation.

And it is obvious that a great deal of his difficulties stemmed from pre-existing deformities of the upper back and neck, with rather advanced degenerative changes due to his age.

* * * * *

- 224 A. Well, I felt that the ulcerous leg was definitely due to the accident. I felt that although he did have insufficient circulation in both legs, that there had been at least some temporary aggravation of that insufficiency in the left leg, from the accident, probably due to soft tissues swelling about the injured area, which interfered with the return of blood through the veins.

All the other things, there is no medical basis where they could be attributed to such an accident.

* * * * *

- 226 Q. Dr. Gordon, going further now, your second examination, as I recall it, was November 19th, 1956. Would you give the same information with reference to that examination? A. Well, at this time the patient was obviously improved. An examination of his left leg showed no drainage from the previous ulcerated area. It was covered with a scaly type of skin, and I flicked a few of the scales off, and there was no drainage underneath it; there was no open area that I could see. The patient stated that it had been healed for a short time. There was indurated tissue around it; that is, the tissue around the previously ulcerated area was thickened, which would be expected after having been present for a long time, as in this case.

He was not wearing any elastic stockings as he did previously, and he told me that he had not been wearing them recently, as I recall. This would indicate an improvement in the circulation of the legs, as the stockings were required for the poor circulation of the legs, due to the venous condition.

The examination of his back and his neck showed it to be similar to that previously noted. The patient thought that he was getting more round-shouldered and stooping over more. I couldn't disclose that by my examination. Of course, as people do get older -- and this is a
227 condition found frequently in older people -- we do know that they do gradually get bent over more and more. We all see that about us, in friends and relatives.

Now, I couldn't see any difference, looking at him on the two occasions. Perhaps there was a little. I wouldn't be able to say. In any event, it had nothing to do with the accident. That is quite obvious.

Now, I also X-rayed his knees at this time, because he said he was having some aching in the left leg, and I thought perhaps he might have some arthritis in the left knee; but there was nothing on the X-rays. The X-rays were completely negative, of the knees.

From the examination, I felt that the patient had improved, that the ulcerated area had healed, and that the circulation had improved. The other conditions, which are, I believe, unrelated to the accident, are apparently status quo.

Q. And in your opinion as at the time of the last examination, would you have recommended further treatment for the left leg, the ulcer type -- A. Well, the ulcer was healed when I examined it, and certainly there is no reason to treat a healed area.

* * * * *

was called as a witness and, having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION
BY MR. WALSH:

* * * * *

271 Q. Will you tell the Court and jury how you came to meet him and know him? A. I was introduced to Mr. Christie by my husband. My husband met Mr. Christie in the lobby of the building shortly after he returned from the hospital. He was on crutches and was having great pain and difficulty getting around. One morning, Bill noticed he was in the lobby and asked him if he could give him a lift, and took Mr. Christie downtown or to his doctor. Shortly after that, I was introduced to him.

272 Q. When you say in the building, Mr. Christie lived in the same building with you? A. Yes, indeed.

Q. Thereafter, did you have any further opportunity to see him? A. Yes. We checked with him every few days to see how he was feeling, and Bill offered to drive him any time he could. About six months later, Mr. Christie came to our apartment one evening. He was very much upset. He was in pain, his leg was still giving him pain, --

THE COURT: This looks like a physician. (Indicating man who had entered courtroom)

Go ahead. We are just excluding a witness.

A. (continuing) He was still in a great deal of pain, and he was also very much distressed about his financial situation at the time. He told us that he was in arrears with his rent, and frankly admitted that he just didn't have enough money to buy his meals the next day. So he asked us if we could loan him money to pay up his rent and for his food. We felt that since we were both working, we could not help him with the rent, but we would be glad to advance him some money every week for his meals, which we did, over a period of weeks.

273 Q. You advanced him something each week? A. Yes, for a period of five or six weeks.

Q. And what was the total? A. It was something like a hundred; it was about a hundred dollars, just a hundred dollars, as I recall.

Q. Has any of that been repaid? A. No, sir.

Q. Did you have any opportunities, in observing Mr. Christie in your apartment, to state whether he had difficulty in walking? A. Yes. The evening he came in, his leg was, he told us that his leg was still bothering him. As I recall, he pulled up his trouser leg and showed me the bandage, and from the looks of the bandage, you could see still it was draining. I also recall he told us at that time that he was still going to the doctor at least once a week for a fresh dressing. He stated it gave him considerable pain at night and it bled a great deal.

* * * * *

CROSS EXAMINATION

BY MR. RICHARDSON:

* * * * *

275 Q. Did you have occasion to see, be in the company of Mr. Christie frequently, or how frequently, from the time you first met him? A. From the time we first met him, we saw him on the average of, oh, I would say three times a week. And if we did not see him, we would always check with the girl at the desk or call his hotel room to check with him to see how he was feeling.

Q. You took that interest in Mr. Christie? A. Yes, we did, because he was all alone.

Q. Did you carry him around in your car? A. Yes, my husband did, numerous times.

Q. Numerous times? A. Yes.

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290

JOHN EDWARD BENTLEY

was called as a witness and, having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION**BY MR. WALSH:**

* * * * *

291 Q. In your position at American University as a dean, did you have occasion to interview applicants for teaching jobs? A. Oh, yes. I did all of that for the college.

Q. You did all of that for the college. And did you receive --
A. During the active deanship. That was from 1945 till '51 or '52; I have forgotten what date.

* * * * *

295 Q. Do you know the plaintiff, Richard B. Christie? A. Oh, yes, I know him quite well, because I think he came during the last year of my deanship, with his difficulties.

Q. Do you know if, while he was at American University during your time there, he actively sought a job as a teacher elsewhere?
A. Yes, I do, because he came to my office several times for information and help.

Q. Do you know when he began to make those efforts? A. No, I have no idea when those applications -- I never kept them in my mind, because these are relatively frequent.

Q. In the course of his discussing this with you, did he ever tell you that he had some prospects? A. Yes. He wrote to, I think it was somewhere in Texas, I believe it was the University of Texas, and I believe that was at the time when he had sustained this injury.

* * * * *

298 BY MR. WALSH:

Q. Doctor, so far as American University is concerned, would an applicant who was hospitalized to such an extent that he could not write letters for two weeks following June 8th prejudice him in, or impair his chances of obtaining a position as a teacher? A. Yes, if --

MR. RICHARDSON: Just a moment, Doctor.

BY MR. WALSH:

Q. -- as a college teacher?

MR. RICHARDSON: With what?

MR. WALSH: At American University.

MR. RICHARDSON: This man is from American University.

299 THE COURT: He said at American University.

MR. WALSH: I stated that. Sorry.

A. If I received such a letter, say, early in June, and then nothing occurred and we were in dire need of filling a position, and nothing came for two to three weeks, I should take it for granted that the individual had been located somewhere. So he would be prejudiced --

THE COURT: You mean if you had written a letter? Is that what you mean?

THE WITNESS: No; if anyone had written one to me.

THE COURT: And you said if nothing came?

THE WITNESS: And then nothing later was sent.

THE COURT: Then, you expect a follow-up?

THE WITNESS: Probably so.

THE COURT: All right. All right.

BY MR. WALSH:

Q. Now, is it usual -- and still referring to American University -- is it usual practice for an applicant, as the time for filling the faculty for the ensuing year grows short, is it usual for the applicant to follow it up actively? A. It is not -- I can't answer that question, because it all depends on the individual. He might and he might not.

The individual, if he had word, he perhaps would not write and say that he had been appointed to a certain position elsewhere. If he had not, he might write a letter indicating that nothing had occurred, and he would
 300 like to know just the status of his letter and the condition that he understood was prevailing at the University.

* * * * *

BY MR. WALSH:

Q. Well, 1954, we are speaking of, the two weeks following June 8th. Is that a vital time for seeking a position? A. An individual might feel that late June is getting toward the danger line; and it is vital.

Q. And it would be necessary, then, to make active efforts?

301 A. Yes, precisely. I should expect an individual who was really in need to write another note at that time.

* * * * *

427 MR. RICHARDSON: ***Well, now, I want to request that counsel for plaintiff be not permitted to use the blackboard, with reference to any figures he has pertaining to damages.

THE COURT: Oh, I won't stop him if he wants to use it to add up. But of course, as soon as he gets through, you can erase it, and that will be the end of it.

MR. RICHARDSON: Then, I further request that he be permitted to use the blackboard for figures only to the extent of the figures in evidence.

THE COURT: Oh, certainly.

MR. RICHARDSON: And nothing beyond that.

THE COURT: He can't draw on his imagination.

MR. RICHARDSON: Thank you.

THE COURT: All right.

MR. WALSH: Thank you. I may not draw on my imagination on the blackboard, he means. I may draw on it otherwise? (laughing) Thank you, Your Honor.

428 MR. RICHARDSON: Thank you.

THE COURT: You can't draw on your imagination either way.

* * * * *

ARGUMENT ON BEHALF OF THE PLAINTIFF

440 MR. WALSH: ***All right. Well, how much of this pain and suffering was involved? 21, 22 days in the hospital on his back. A month and a half on crutches. And on a cane. And some time after that, unable to move around except by taxi and the help of friends giving him rides. That is testified to by Mrs. MacDonald, the neighbor.

* * * * *

441 But he was on his back, and he certainly lost earnings then, whether it was summer school at American University, which had not yet been determined, because the registration had not been totaled, or a job up in Maine, a summer job, of which there were plenty of summer jobs every summer. He gave the value of that as a thousand dollars. Well, certainly he lost that.

* * * * *

442 So great was his need that he fell behind on his rent, and the
443 landlord threw him out on the street. It is called filing a suit for possession in the landlord and tenant branch of the Municipal Court. But he was tossed out on his ear.

* * * * *

444 Now, it has been proved -- and this has all been testified. (at blackboard) Georgetown Hospital, 420. (Writing on board) Orthopedic surgeon, Dr. Rush, 325. Taxis after he got off his crutches to be transported, 140. \$80 for the suit that was ruined when the truck went over him. \$35 for the reading glasses which were thrown and scratched and unusable. \$1,000, very clear.

The summer job, the work he couldn't do when he was on his back or on crutches, \$1,000. \$2,000. All testified to.

MR. RICHARDSON: If Your Honor please, I object to this item, in view of the fact that there is no testimony whatsoever as to how much Professor Christie would have made, had he gotten this summer school job.

THE COURT: I think he said it would be a thousand dollars.

445 MR. RICHARDSON: He did? Then I beg your pardon.

THE COURT: That is my recollection; but the jury will recall.

MR. RICHARDSON: That wasn't my recollection.

MR. WALSH: Now. He did not get the teaching job for the ensuing academic year of 1954-5. \$4500. (Continuing to write on board)

THE COURT: I thought he said he made \$3400.

MR. RICHARDSON (Simultaneous with Court): I don't recall that, if Your Honor please.

MR. WALSH: \$3400, if Your Honor please, plus summer school, which he testified is the usual thing, that if you get the nine months' job, you get the summer school.

THE COURT: Very well.

MR. RICHARDSON: Well, what university was this?

THE COURT: You may argue that point?

MR. WALSH: Not on my time, please, Mr. Richardson.

THE COURT: You may argue.

MR. WALSH: Now we have got \$6500.

Now, he found himself down in the Winter Park Hospital with a bleeding ulcer. 578. The doctor down there, 177. (Writing on board as before) The ulcer doctor here. (Writing 50 on board) \$805. (Writing \$7305 on board)

All right, now. As a result of all this, certainly it has been shown that from that time, his earning capacity has certainly been
446 impaired. He has been making, as he has testified, approximately \$2500. Had he been able to work in his usual capacity, \$4500. So that for the last year, he has lost \$2000, the difference between \$2500 and \$4500.

Now, that is 9300.

What about the future? There has been testimony by Dr. Sullivan and Dr. Rush that he won't be able to do the type of work for the future. Well, he is 65. A man of his education and his training should certainly be able to earn \$4500 a year until he is 70. That's five years, at a difference of \$2000. So we will take the 9300 and we will add five years at \$2000 a year: 29,300. (Sic)

Now, pain and suffering, -- I had to drop the crayon.

THE COURT: Your 40 minutes have now expired. If you want to save 10 minutes for rebuttal, this is the time to do it.

MR. WALSH: Well, I suggested to Mrs. Burroughs that it was a minute I had. We put it at 12:29.

THE COURT: All right.

MR. WALSH: Just one minute.

I just wanted to point out that pain and suffering, I am not putting pain and suffering down there. How much? 21 days in the hospital. How much a day for the days in the hospital, at Georgetown? How much on the crutches and on the cane? How much, walking in the streets to the doctors? How much, all those months before going to
447 Florida? How much for the ulcer? How much for the days in the hospital with the bleeding ulcer, when he had blood transfusions? That is pain and suffering. He is entitled to be compensated for it.

But who can say what the value is? That is, who can testify to the value? Who can give evidence? Nobody. You have got to give a value to it. Because he is entitled to be compensated for all the items that have been enumerated here -- because, of course, you are free to give your own values to them. But all those items, all those elements, plus pain and suffering, from June 8th to today; and for the future, for the future, so long as injuries which caused pain and suffering, and which have been the result of this accident, persist.

Thank you, ladies and gentlemen.

Thank you, Your Honor.

MR. RICHARDSON: Mr. Walsh, take a minute of my time and correct this computation here, if you will. I don't think that is 29,000.

MR. WALSH: Oh, I'm sorry. (Correcting figure on board from 29,300 to 19,300)

MR. RICHARDSON: Thank you.

* * * * *

448 REBUTTAL ARGUMENT ON BEHALF OF THE PLAINTIFF

* * * * *

452 MR. WALSH: (At board, as before) His pain and suffering, dollars and cents, question mark (writing), pain and suffering to be added to all the other things which have been proved; and of course, the value of which you are free and you have the duty to determine.

* * * * *

231 JURY CHARGE

THE COURT: ***Now, you have a duty, separate and apart from the judge's duty, and that is to find the facts; and after you

have found the facts, you are to apply the law as I give it to you to those facts and reach a proper verdict. You are the fact-finding body. In finding the facts, you become the judges of the facts. You are the sole judges of the facts.

Now, how will you determine those facts? You will determine them on one basis alone: the evidence and inferences reasonably deducible from the evidence. The evidence consists of what you have heard from the lips of witnesses who have appeared before you, and the exhibits which have been received in evidence, and nothing else. You are not to guess or speculate, either as to liability or as to damages, but will limit your determination of the facts to the evidence and inferences reasonably deducible from the evidence.

* * * * *

232 Now, when I tell you that you are limited to the evidence in determining the facts, that does not mean that you cannot use your common sense or your experiences in life. You should use your common sense and your experiences in life when you weigh and evaluate and sift the testimony which you have heard.

* * * * *

233 In performing your task and in approaching your task, you must be fair and impartial and not allow sympathy or prejudice or emotion of any kind to influence or enter into your thinking or into your determination of the facts.

* * * * *

You should give close attention to the summations of counsel, because they are designed to assist you in organizing the facts in your minds. But you should remember that what each has said is said as an

advocate, and you should consider the summations in the light of their advocacy. You should also bear in mind that what counsel have said to you is not evidence, and if your recollection differs from theirs, it is your recollection that governs, and not theirs.

* * * * *

245 Now, if you find for the plaintiff, then you will come to the
246 question of damages. The plaintiff claims, in addition to the injuries immediately referable to the accident, that is, the injuries to his legs, further injuries, including a duodenal ulcer induced by nervousness and tension growing out of his physical injuries and concern over his financial condition, proximately resulting from the accident. Defendants claim that the duodenal ulcer is not referable to the accident, but is due to other causes having no relationship to it.

Plaintiff also claims that he has been deprived of earnings because of his incapacity to work as a college professor, and impairment of earning power because of his inability in the past and in the future to work as a college professor; but defendants claim that such impairment as he suffered would not have interfered with his employment as a college professor, and that he has not shown that he was able to obtain employment as a college professor, under the evidence.

On the question of damages, then, you will award to the plaintiff a sum which will fairly and reasonably and adequately compensate him for the damages proximately resulting from the accident, including the reasonable value, not exceeding the charge to the plaintiff, of the examinations, attention and care by physicians and surgeons, reasonably required and actually given in the treatment of plaintiff, and reasonably
247 certain to be required and given in the future, if any, including in such care, X-ray pictures and laboratory tests reasonably necessary; the reasonable value, not exceeding the cost to the plaintiff, of hospital accommodations and care reasonably required and actually given in the treatment of plaintiff, and reasonably certain to be required and given

in the future; the reasonable value of the time lost by plaintiff since his injury wherein he was unable to pursue his occupation, in determining which you should consider the evidence of his earning capacity, his earnings, and the manner in which he ordinarily occupied his time before the injury and after the injury, and find out what he was reasonably certain to have earned in the time lost, had he not been disabled, and any loss of earning power occasioned by his injury, and from which he is reasonably certain to suffer in the future, considering his health, physical ability, and earning power before the accident and what it is now, so far as it has been reduced by the injuries sustained on June 8, 1954.

You will also consider the nature and extent of his injuries, whether or not they are reasonably certain to be permanent or, if not permanent, the extent of their duration -- all to the end of determining fairly and reasonably the effect of his injuries upon his future earning capacity and the present value of the loss suffered, and such sum as will reasonably compensate him for the pain, discomfort and mental
 248 anguish suffered by him, and which he is reasonably likely to suffer in the future which, as I have stated, you find proximately resulted from the injury in question.

* * * * *

249 (At 6:00 p.m., the jury returned to the courtroom and the following proceedings were had:)

THE COURT: Who is the foreman?

THE JURY FOREMAN: I am. (Rising to his feet)

THE COURT: Mr. Foreman, not having heard from you, I assume that the jury has not as yet agreed upon a verdict.

THE JURY FOREMAN: We have agreed on the liability but not on the amount.

THE COURT: Well, it is now six o'clock, and I assume that -- or rather, I suppose that some of you have engagements for the

evening. Be seated, sir. Under those circumstances, I am going to allow you to separate and then return tomorrow morning at ten o'clock and resume your deliberations -- that is, unless you think there is likelihood, Mr. Foreman, of reaching an agreement within a reasonably short time. Do you think there is such a likelihood? Don't state anything except yes or no.

THE JURY FOREMAN: There is a possibility.

THE COURT: Well, do you think that another half hour might be desirable before I release you for the night?

THE JURY FOREMAN: I think it is worth trying, yes.

THE COURT: Very well, I will let you deliberate a little further until, say, six-thirty, and then if you don't reach an agreement, I shall take appropriate steps in the matter.

250 I don't want anyone to give up his views at all because of the time limitation. This case is entitled to your full, fair and complete consideration, even though it has to go over until tomorrow.

(Whereupon, the jury retired once more, to resume its deliberations in the jury room.)

THE COURT: Well, I will see you at six-thirty.

MR. RICHARDSON: I beg your pardon?

THE COURT: I will see you at six-thirty. If they don't reach agreement by then, I am going to send them home for the night and let them come back tomorrow morning.

MR. RICHARDSON: I think they will reach an agreement.

THE COURT: Well, we shall see what we shall see.

(Whereupon, the Court recessed once more, to await the verdict of the jury.)

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

*United States Court of Appeals
For the
District of Columbia Circuit*

FILED

JUN 11 1957

Joseph W. Stewart

CLERK

No. 13,756

ROBERT E. HAYCOCK, JR., AND
STANDARD FLOORS, INC.,

Appellants

v.

RICHARD B. CHRISTIE,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RICHARD L. WALSH

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Washington 4, D. C.

Attorney for Appellee

STATEMENT OF QUESTIONS PRESENTED

1. Whether the trial court abused its discretion in denying appellant's motion for a new trial on the grounds that the verdict was excessive and contrary to the evidence where the jury was charged properly and where there was evidence which, viewed most favorably to appellee, provided substantial basis for the denial.

2. Whether the trial court abused its discretion in denying appellant's motion for a new trial upon condition that appellee file a remittitur where the trial court did not find that the verdict of the jury was based on passion or prejudice.

3. Whether the trial court abused its discretion in denying appellant's motion for a new trial on the ground that appellee's counsel wrote figures on the blackboard during his argument to the jury where said counsel made proper references to the testimony and evidence and to the conclusions and inferences fairly deducible therefrom.

4. Whether the trial court abused its discretion in denying appellant's motion for a new trial on the ground that the trial court had mishandled the jury where counsel for appellant had not objected to the trial court's offering the jury the opportunity to deliberate an additional half hour if they desired and the jury accepted the offer.

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA
CIRCUIT

No. 13,756

ROBERT E. HAYCOCK, JR., and
STANDARD FLOORS, INC.,

Appellants

v.

RICHARD B. CHRISTIE,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellee, while walking on the sidewalk of Wisconsin Avenue,
Northwest, Washington, D. C., about noon on Monday, June 8, 1954,
was knocked down and run over by a large truck driven by appellant
Haycock and owned by defendant Standard Floors, Inc., which emerged
from a private driveway. Appellee saw the front wheel of the truck
go over both of his legs but he did not lose consciousness. (jt. app. 15)

The driver stopped the truck, told appellee, "I didn't see you" (jt. app. 16) and "It felt like I was going over a barrel." (jt. app. 17) The driver helped appellee, whose both legs were bleeding rapidly, into the cab of the truck. (jt. app. 16) and carried him to Georgetown Hospital. (jt. App. 18) There, appellee was helped by an orderly and a nurse into the emergency room where he was put on a stretcher. (jt. app. 18) He was immediately put to bed and remained in the hospital for about a month. (jt. app. 18) During his stay he was treated by Dr. Robert C. Rush at least once each day. (Jt. app. 18) Towards the end of his stay he was helped by an orderly into a wheelchair. (jt. app. 19).

Upon his discharge from the hospital he returned on crutches to his apartment where he lived alone. (jt. app. 19) He was treated actively by Dr. Rush until the following April, nine months later. (jt. app. 19, 46) For one and one-half months he had to use taxis for transportation, including going to his daily meals. (jt. app. 20) Then he was able to get around by himself, but slowly; and at street crossings with the aid of other pedestrians. (jt. app. 21) Dr. Rush had found that the "crushing" (jt. app. 52) of both legs had caused damage to all the soft tissue, resulting in wounds to both legs and a large hemorrhagic blister on the left leg which had to be opened and treated. (jt. app. 44) The wounds were treated regularly until April 1, 1955. (jt. app. 44) These open wounds are the type most frequently painful. (jt. app. 46) At this time, April 1, 1955, the wounds of the right leg were doing quite well but there was still considerable opening in the wound of the left leg. (jt. app. 44) Appellee was below normal activity. (jt. app. 46) His pain in walking was caused by movement of tissues in the open wounds. (jt. app. 47)

Dr. Rush did not examine appellee again until November 19, 1956, when he found that there was still a small weeping area on the wound on the left leg. (jt. app. 44) There was a diminution of circulation to the skin over the wound and the lower left leg was smaller in circumference

than the right leg. (jt. app. 45) The skin on the right leg was still discolored. (jt. app. 45) Appellee still had some disability of the left leg and would continue to suffer from weakness in both legs due to circulatory damage. (jt. app. 45) The extensive damage to soft tissue had caused this condition to persist for two and one-half years. (jt. app. 45) The open ulcer on the left leg caused pain due to exposure of nerve endings on the open wound. (jt. app. 47) There was permanent circulatory damage to the lower extremities. (jt. app. 47) Dr. Rush was not in a position to give an estimate, percentagewise, of appellee's disability (jt. app. 49) but said that appellee would be impaired in an occupation which would require him to be on his feet considerably - that standing or walking would not be indicated in his case (jt. app. 48) - "he probably will always have some disturbance from the extremity, due to the circulatory change." (jt. app. 52)

Appellee was graduated from Yale University in 1914 and taught mathematics and English for three years in Portland Academy, Portland, Oregon. (jt. app. 12) After two years in the Navy he spent about twenty-five years in the advertising field in New York City. (jt. app. 13) His last job there was with the Guaranty Trust Company at \$7,000 per year and bonus. (jt. app. 13) He left business to become Professor of Advertising at Kent University in Ohio. (jt. app. 14) After eight years at Kent he left in 1953 to teach at American University in Washington, D. C. (jt. app. 14) His salary at Kent was \$5,600 per year, including summer school; (jt. app. 14) his contract at American University was for \$3,450, not including summer school for which he expected to be paid an additional \$1,000. (jt. app. 23) Appellee decided that American University did not offer what he wanted and in March 1954 began to correspond for a job with other universities, which he said was the customary procedure for seeking employment. (jt. app. 20) Up until June 8, 1954, when he was hospitalized as a result of the accident, he had written about 75 letters and had what he thought was a "sure possibility" of a job at Texas University. (jt. app. 20) He later learned

that they had taken a local man because they hadn't heard from him during the time he was laid up. (jt. app. 20) During the last week of hospitalization, he had a stenographer come in and he continued writing for college employment. (jt. app. 20) Because of hospitalization and subsequent immobilization he could not take the opportunity for a personnel job in Portland, Maine, which paid \$1,000 for the summer. (jt. app. 23) By the time he was able to get around by himself the academic year had begun and there were no college teaching jobs, and so he started to look for a non-college job in order to pay living expenses. (jt. app. 22) While seeking a job he had a great deal of pain; quite often his leg hemorrhaged at night, leaving a pool of blood in the bed. (jt. app. 24) This was contrary to Dr. Rush's orders but he persisted because he had to find a job in order to live. (jt. app. 24) He had drawn his last salary check from American University about a week after the accident. (jt. app. 21) His local savings of \$600 were used for living expenses, his savings of \$1,500 in the pension fund at Kent was withdrawn and used for living. (jt. app. 21, 22) Having no income or other source of funds, he borrowed from two banks and a friend. (jt. app. 21, 22) He fell two months behind in his rent and was put out of his apartment, after suit filed, although he borrowed from a bank and paid his rent. (jt. app. 22, 23) In March 1955 he went to the Veterans Administration and, after examination, was granted \$66.15 monthly as a permanent disability pension. (jt. app. 23)

A friend of appellee's in Scarsdale, New York, invited him to spend the summer there. (jt. app. 23) He did, and on October 1, 1955, went to Winter Park, Florida, and found a job the following January. (jt. app. 28) From January until he went to the hospital the following October, appellee earned an average of \$45-50 per week. Following his arrival in Winter Park, he started having terrific stomach pains after meals and suffered loss of energy. (jt. app. 25) This pain persisted for about a year and he went to Dr. Ramsey in Winter Park

who found him suffering from a "bleeding ulcer" and sent him to the hospital on October 19, 1956. (jt. app. 25) A bleeding occurs because the ulcer has eroded to a depth enough in the duodenum to permit the exposure of a blood vessel and erode right through it so that there is no protection for it, and it bleeds, similar to a real severe abrasion to the skin. (jt. app. 57) In an acute blood loss the manifestations would be those of shock: the patient would collapse, unable to arise, his skin would be cold, clammy, blood pressure low, pulse rapid, and the patient would need immediate replacement of the blood lost. (jt. app. 57) In the case of the "oozing" type of bleeding, the patient would suffer progressive weakness, easy fatigue, no ambition, no desire to do anything except lie down and rest. (jt. app. 57) Appellee was discharged after 26 days, on November 14, 1956, after having had 10 X-rays, 4 blood transfusions, and treated by Dr. Ramsey every day. (jt. App. 26, 27) Before the accident he had never had trouble eating - he had had a "cast iron stomach." (jt. app. 27) During his hospitalization appellee lost 20 pounds. (jt. app. 56)

Appellee came to Washington for the trial of this case and was examined by Dr. John C. Sullivan on November 19, 1956, who found an active duodenal unhealed ulcer with tenderness over the area, hematocrit a few points below normal, and no evidence of a previous ulcer. (jt. app. 56) Appellee's duodenal bleeding ulcer would be produced by the emotional stress, harassment, and frustration he suffered following the accident. (jt. app. 60) Speaking of appellee's worry, stress and strain, Dr. Sullivan said he thought it caused the ulcer. (jt. app. 68) It is painful and interferes with the patient's daily work and ordinary activities. (jt. app. 56)

Appellee incurred charges in Georgetown Hospital during his stay caused by the accident in the sum of \$420.70. (jt. app. 19) Dr. Rush's bill for treatment of the injuries caused by the accident was \$325. (jt. app. 24) Appellee's \$80 suit and \$35 eye-glasses were ruined by the accident. (jt. app. 28) Appellee's bill for his hospitalization

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for his bleeding duodenal ulcer at Winter Park was about \$600 (jt. app. 26), Dr. Ramsey's bill for treatment of the ulcer was \$177 and Dr. Sullivan's bill was \$50. (jt. app. 27). Appellee spent three dollars a day for one and one-half months for taxi fares. (jt. app. 20).

SUMMARY OF ARGUMENT

Appellant complains that the trial court abused its discretion in denying his motion for a new trial on the grounds that the verdict of the jury was excessive and contrary to the evidence. This court has no power to review the facts; it cannot disturb the verdict for mere excessiveness. This rule is well settled in this jurisdiction and all federal appellate courts, following a long line of Supreme Court decisions.

Appellant does not allege that the trial Court's charge was improper or prejudicial; he does not complain of any improper conduct on the part of appellee's counsel. He does not specify any act or word that caused the jury to return a verdict allegedly based on passion and prejudice. He merely expresses dissatisfaction with the size of the verdict and would have this Court hold that the trial court abused its discretion in not inferring passion and prejudice from the size of the verdict alone.

Appellant also complains that the trial court should not have ordered a remittitur. Again, he gives no reason other than that he believes that the verdict of the jury was excessive and therefore the result of passion and prejudice. He does not point to any proof in the record supporting his charge of passion and prejudice. The Supreme Court approved the use of the remittitur as long ago as 1822 and its application since then has been a salutary influence in the administration of justice in avoiding needless new trials.

Appellant also complains that the trial judge permitted counsel for appellee to write figures on the blackboard during his oral argument to the jury. However, appellant's brief in support of this charge of abuse of discretion merely serves to prove that counsel for appellee properly referred to the testimony and the conclusions and inferences fairly deducible therefrom.

Finally, appellant complains that the trial court coerced the verdict by his handling of the jury. Examination of the facts reveals that the trial court, solicitous for the personal convenience of the jurors, offered the jury another half hour to deliberate so that they would not have to return the following morning.

This court, can reverse the ruling of the trial court in denying a new trial only when it is clearly shown that there has been an abuse of discretion. Appellant has failed to carry this burden.

ARGUMENT

I. THIS COURT CANNOT REVIEW THE TRIAL COURT'S DECISION TO DENY A NEW TRIAL ON THE GROUNDS THAT THE VERDICT WAS EXCESSIVE AND CONTRARY TO THE EVIDENCE.

Appellant's dissatisfaction with the size of the verdict cannot be relieved in this Court. "It is settled that we cannot review a trial court's decision to grant or deny a new trial on the ground that a verdict was excessive or inadequate." Feltman v. Sammon, 82 App. D. C. 404, 166 F. 2d 312.

The Per Curiam opinion in the Feltman case cited Washington Times Co. v. Bonner, 66 App. D. C. 280, 86 F. 2d 836, in which Justice Stephen had stated, at page 293:

"In any event, we are not at liberty to reverse on account of the size of the verdict. The rule is well settled in the Federal courts, not only in libel actions but also in general, that an appellate tribunal will not review the action of a trial court in granting or denying, for excessiveness or inadequacy of the verdict, a motion for a new trial.

That "the rule is well settled in the Federal courts" - and has been for many years -- is proved by an examination of Supreme Court decisions as far back as Railroad Company v. Fraloff, 100 U.S. 24, 25 L. Ed. 531. There, at page 31, Mr. Justice Harlan stated the Court's authority in the premises:

"No error of law appearing upon the record, this court cannot reverse the judgment because, upon examination of the evidence, we may be of the opinion that the jury should have ~~returned a verdict for a less amount.~~ If the jury acted upon a gross mistake of facts, or were governed by some proper influences or bias, the remedy therefore

rested with the court below under its general power to set aside the verdict * * * Our authority does not extend to a re-examination of facts which have been tried by the jury under instructions correctly defining the legal rights of parties."

Appellant does not contend that the trial court's charge to the jury was incorrect in any respect. (Jt. App. 83) The jury took the case under proper instructions as to the law and after deliberating upon the facts adduced in testimony and evidence returned a verdict which the appellant thinks is too large. The remedy for an excessive verdict lies with the trial court -- alone. This was stated precisely by the Supreme Court in Erie Railroad Co. v. Winter, 143 U.S. 60, 75, 12 S. Ct. 356, 36, L. Ed. 71:

"Whether the verdict was excessive, is not our province to determine in this writ of error. The correction of that error, if there were any, lay with the Court below upon a motion for a new trial, the granting or refusal of which is not assignable for error here."

Even if appellant persuaded this Court to share his opinion that the verdict was too large, that would not be sufficient, standing alone, for disturbing the trial court's ruling. Mr. Justice Holmes pointed this out in Southern Ry. - Carolina Division v. Bennett, 233 U.S. 80, 86, 34 S. Ct. 566, 58 L. Ed. 860:

"The supposed error most insisted upon is the entering of judgment upon a verdict said to be manifestly excessive. It is admitted that the judge charged the jury correctly. * * * but it is thought to be apparent as a matter of law that the jury found more than the charge or the law allowed. * * * But a case of mere excess

upon the evidence is a matter to be dealt with by the trial court. It does not present a question for re-examination here upon a writ of error. Lincoln v. Power, 151 U.S. 436; Herencia v. Guzman, 219 U.S. 44, 45. The premises of the argument for the plaintiff in error were not conclusive upon the jury, and although the verdict may seem to us too large, no such error appears as to warrant our imputing to judge and jury a connivance in escaping the limits of the law."

That the Supreme Court meant this rule to bind the circuit courts of appeals is stated by Mr. Justice Brandeis in Fairmont Glass v. Cub Fork Coal Co., 287 U.S. 474, 481, 53 S. Ct. 252, 77 L. Ed. 439:

"The rule that this Court will not review the action of a federal court in granting or denying a motion for a new trial for error of fact has been settled by a long and unbroken line of decisions; and has been frequently applied where the ground of the motion was that the damages awarded by the jury were excessive or were inadequate. The rule precludes likewise a review of such action by a circuit court of appeals."

The circuit courts of appeals have followed this salutary rule. The 2nd Circuit in Herzig v. Swift & Co., 154 F. 2d 64, 66, recognized it:

"There was, therefore, evidence as to the damages and, though the verdict may have been generous, the amount of the damage sustained was a question of fact not reviewable in this court on appeal."

The 5th Circuit held similarly in Reid v. Nelson, 154 F. 2d 724, 725:

"* * * the question whether the verdict is excessive or not is one exclusively for the trial court to determine, and is not subject to be re-examined in a federal appellate court."

The 8th Circuit has been governed by this rule in Chicago & N. W. Ry. Co. v. Green, 164 F. 2d 724 and in Kurn v. Stanfield, 111 F. 2d 469, and in other cases cited in Kurn.

Appellant cites the 4th Circuit case of Virginia Ry. Co. v. Armentrout, 166 F. 2d 400, which reversed the trial court's refusal to grant a new trial. The reason for the court's action is found at page 406:

"It is a reasonable assumption that this prejudicial charge to which exception was taken influenced the jury adversely to defendant and was a contributing factor in causing the jury to return a verdict in an excessive amount."

Appellant does not claim that there was any prejudice in the trial court's charge - or any where else, except in the size of the verdict. It is helpful to compare the verdict in the case at bar with the verdict in the Virginia Ry. Co. The court discusses that verdict in language contained between the headnotes (10-12) and (16) quoted by appellant:

"(13) There can be no question that the award of \$160,000 here was greatly in excess of any proper award.*** The present worth of such an annuity of \$3,000 per year, the loss of earning power estimated by the judge, would be less than \$85,000, or but little less than half of the verdict awarded. Surely, no such verdict should have been allowed to stand."

"(14, 15) * * * It is for the jury to fix the amount but they must do this within the bounds of reason, and a verdict on which the mere interest at 3% amounts to more than five times the maximum allowed by the state compensation laws and \$1,800 per year more than the judge estimates the loss of adult earning power is manifestly too much."

Appellant cites a Missouri case, Day v. Union Pacific Co.

, 276 S. W. 2d 212, which he states has "a somewhat similar factual situation on damages." There, the plaintiff, following the accident, went to a hospital for x-rays and then returned to the scene and drove his tractor-trailer - "had no difficulty" in driving it back to Kansas City, Missouri, from Topeka, Kansas. He stayed in bed the next day, remained in bed for a week, and took heat treatments. He did not offer any other evidence as to when, for whom, or at what wages he worked after the collision. Yet, even in this "somewhat similar" case, the Court, in upholding the trial court's granting a new trial to defendant, stated at page 216: "While the evidence considered in the light most favorable to plaintiff, would have supported opposite findings, * * *" The court would have upheld the trial court's denying a new trial to defendant. This it would have done because:

"It follows then that the trial court's order must be sustained unless all of the evidence as to plaintiff's injury and damage, viewed in the light most favorable to sustention of the trial court's ruling, shows that there was no substantial basis for the order."

That the court in the Day case did not reverse because of its own opinion of the size of the verdict is shown by the following, at page 216:

"In ruling whether a verdict was so excessive as to indicate bias and prejudice of the jury, the trial court, unlike an appellate court, weighs the evidence."

Appellant's failure to specify any instance of appeals made to passion and prejudice leaves him with only the contention that this Court should infer passion and prejudice from the size of the verdict alone. In the Day case the court cited Bailey v. Interstate Automotive, 358 Mo. 1121, 219 S. W. 2d 333, which latter court stated at page 340:

"And we bear in mind the trial judge participated in the trial and knew what took place, much of which cannot be preserved in any record. It has been said that, in view of the trial court's opportunity to measure the general effect of the trial proceedings on the jury, the trial court may infer bias and prejudice from the size of the verdict alone."

This common-sense observation would leave to the trial court in the case at bar the power to infer bias and prejudice. This the trial court refused to do in denying appellant's motion for a new trial. Now, appellant would have this Court draw that inference.

A sound reading of the Counterstatement of the Case shows that the jury had substantial evidence of the appellee for its consideration. Hence, as Mr. Justice Hughes stated in Herencia v. Guzman, 219 U.S. 44, 14 S. Ct. 387, 55 L. Ed. 81:

"As there was evidence proper for the consideration of the jury, the objection that the verdict was against the weight of evidence, or that the damages allowed were excessive, cannot be considered."

The same rule was stated by Mr. Justice Douglas in United States v. Socony-Vacuum Oil Company, 310 U.S. 150, 248, 60 S. Ct. 811, 855, 84 L. Ed. 1129:

"Certainly, denial of a motion for a new trial on the grounds that the verdict was against the weight of the evidence would not be subject to review."

The 8th Circuit Court in Southern Ry. Co. v. Walters, 47 F. 2d 3, 7, observed the rule:

"It is seriously urged that the court erred in denying defendant's motion for a new trial. This court has often held that a motion for a new trial on the ground that the verdict is not sustained by the evidence is addressed to the discretion of the trial court, and its ruling thereon will not be reviewed on appeal. * * * This is not a case in which the lower court arbitrarily refused to consider the motion for a new trial, but it appears from the record that, after very careful and thoughtful consideration of the motion, the court denied the same."

Appellant does not allege that the trial court refused or failed to give careful and thoughtful consideration to his motion. As the argument in his brief shows, he merely continues his disagreement with the trial court's ruling that appellee's evidence was sufficient to deny a new trial. It would not be profitable for appellee to engage in discussion and analysis of the evidence because the foregoing rule precludes this court from weighing the evidence. This was a personal injuries case, the very type of case which calls for the unique function of the jury to determine damages. As the court said in Fornwalt v. Reading Co., (U.S.D.C. Pa. 1948) 79 F. Supp. 921, 923, cited by appellant:

"Where the damages are unliquidated and there is no fixed measure of mathematical certainty, no precise rule or yardstick for translating injury into money, courts in general are reluctant to disturb a jury's verdict on the ground of excessiveness. This is particularly true in respect to damages in tort actions for personal injury."

II. THE TRIAL COURT HAD THE POWER TO DENY APPELLANT'S MOTION FOR A NEW TRIAL UPON CONDITION THAT APPELLEE FILE A REMITTITUR OF A PORTION OF THE VERDICT.

Appellant was dissatisfied with the verdict of the jury and is not satisfied with the judgment for a smaller amount entered thereon by the trial court. He demands a complete new trial even though "The consequences has been to prolong litigation, to swell bills of cost, to delay final adjudication, and, in a large number of instances, to have such excessive judgments repeated over and over, upon the new trial." Correction of Damage Verdicts by Remittitur and Additur, 44 Yale L. J. 318.

Appellant disagrees with the trial judge's opinion of the amount by which the jury's verdict was generous; he does not allege that the jury should have returned a verdict for him. He attacks the use of the remittitur in this case but the practice is well settled, as stated in 44 Yale L. J. 318, *supra*:

"When the jury has returned a verdict for unliquidated damages which the trial court deems excessive, but not caused by passion or prejudice, most American jurisdictions allow the court to deny a new trial on condition that the plaintiff agree to a remission of the excess above an amount which the court considers reasonable."

The practice has been endorsed by the Supreme Court and the reasons therefor given in Arkansas Valley Land & Cattle Co. v. Mann, 130 U.S. 69, 74, 9 S. Ct. 458, 32 L. Ed. 854:

"The practice which this court approved in Northern Pacific Railroad v. Herbert is sustained by sound reason, and does not, in any just sense, impair the constitutional right of trial by jury. It cannot be disputed that the court is within the limits of its authority when it sets aside the verdict of the jury and grants a new trial where the damages are palpably or outrageously excessive. * * * Yet, in considering whether a new trial should be granted upon that ground the court necessarily determines, in its own mind, whether a verdict for a given amount would be liable to the objection that it was excessive. The authority of the court to determine whether the damages are excessive implies authority to determine when they are not of that character. To indicate before the passing upon the motion for a new trial, its opinion that the damages are excessive, and to require a plaintiff to submit to a new trial, unless, by remitting a part of the verdict he removes that objection, certainly does not deprive the defendant of any right, or give him any cause for complaint."

In short, appellant has no cause for complaint because the trial court entered judgment for \$17,500 instead of \$25,000.

The age of the practice was commented upon by Mr. Justice Sutherland in Dimick v. Schiedt, 293 U.S. 474, 482, 55 S. Ct. 296, 79 L. Ed. 603:

"There is a decision by Mr. Justice Story, sitting on circuit, authorizing such a remittitur as early as 1822. Blunt v. Little, 3 Mason 102. There, the jury returned a

verdict for \$2,000 damages, suffered as a result of a malicious arrest. Defendant moved for a new trial on the ground that the damages were excessive. The court asserted its power to grant a new trial upon that ground, but directed that the cause should be submitted to another jury unless plaintiff was willing to remit \$500 of the damages. This view of the matter was accepted by this Court in *Northern Pacific R. Co. v. Herbert*, 116 U. S. 642, 646-8, and has been many times reiterated. **** Since the decision of Mr. Justice Story in 1822, this court has never expressed doubt in respect to the rule, and it has been uniformly applied by the lower federal courts."

And, predicted the Court at page 485: "'* * * we may assume that in a case involving a remittitur, which this case does not, the doctrine would not be reconsidered or disturbed at this late day."

A simple but sound justification for the practice was given by the Court at page 486:

"Where the verdict is excessive, the practice of substituting a remission of the excess for a new trial is not without plausible support in the view that what remains is included in the verdict along with the unlawful excess -- in that sense that it has been found by the jury -- and that the remittitur has the effect of merely lopping off an excrescence."

Mr. Justice Stone, at page 497 in the same case, used a familiar analogy to explain the practice:

"The trial judge who denies a motion for a new trial, because the plaintiff has consented to reduce or a defendant has consented to increase the amount of the recovery, does no more than, when sitting in equity, he withholds relief upon the compliance with a condition, the performance of which will do substantial justice."

Appellant cites Southern Pacific Co. v. Guthrie, 180 F. 2d 295, for the proposition that a remittitur cannot cure a verdict based on passion or prejudice. However, regarding appellant's contention that the appellate court can infer passion or prejudice from the mere size of the verdict, the 9th Circuit Court has this to say, immediately following its language quoted by appellant:

"Some authorities hold that passion and prejudice may not be inferred from the mere excessiveness of the verdict, proof of appeals to passion and prejudice not appearing in the record. Larsen v. Chicago & N. W. R. Co., 7 Cir., 171 F. 2d 841, 845.* * * There is an abundance of authority in the decisions of the federal courts that in this situation an appellate court has no power to do anything about such a verdict. The view most commonly expressed is that stated by Judge Goodrich, for the Court of Appeals of the Third Circuit, in Scott v. Baltimore & O. R. Co., supra, as follows: 'A long list of cases in the federal courts demonstrates clearly that the federal appellate courts, including the Supreme Court, will not review a judgment for excessiveness of damages even in cases where the amount of damage is capable of much more precise ascertainment than it is in a personal injury case.'"

The court in the above case not only refused to grant a new trial but did so on the ground that there was no proof of appeals to passion and prejudice appearing in the record. In that significant respect that case is similar to the case at bar and should be cited in support of appellee.

The 7th Circuit Court in Larsen v. Chicago & N. W. R. Co., cited in the Southern Pacific Co. case also contributed a thought that is pertinent to the circumstances of the case at bar, at page 845:

"We have no authority to tamper with the jury's verdict * * * Moreover, it is now well settled that the fixing of the amount of damages in an action for personal injuries is peculiarly within the province of the jury, there being no regular standard by which to measure,"

Appellant cites Minneapolis, St. P. & S. S. M. Ry. Company v. Moquin, 283 U.S. 520, 51 S. Ct. 501, 75 L. Ed. 1243, in which the petitioner moved to set aside the verdict of the jury on the ground that the misconduct of respondent's counsel in making appeals to passion and prejudice had prevented an impartial trial. The state court, at 181 Minn. 63, 64, 231 N. W. 829, 833, had found: "From the entire record before us we are of the opinion that the verdict is excessive because of passion and prejudice." Of this Mr. Justice Roberts, in the language quoted by appellant, said: "The finding is quoted above, and our sole concern is as to the action it requires.* * * Obviously such means may be quite as effective to beget a wholly wrong verdict as to produce an excessive one." Appellant should gain no comfort from this language. The trial court did not make a finding of passion and prejudice in the case at bar. Appellant does not allege that the verdict of the jury was "wholly wrong": the jury found appellant liable for appellee's damages.

Appellant cites another case which does not support his position in the case at bar, National Surety Co. v. Jean, 6 Cir., 61 F. 2d 197, as will be seen from the following language which, in the opinion, immediately precedes that quoted by appellant:

"The court determined the motion in a memorandum opinion which gave particular consideration to the co-related grounds (1) and (9). The opinion stated: 'So it is now before me on motion for a new trial, the main ground of which is the 'damages assessed by the jury are excessive.' I should have said that the present jury fixed the damages at \$25,000.00 and it is argued now that it is unreasonable and shows malice, caprice or excitement and that it is for that reason I should at least order a remittitur.' (Italics ours.)

"Then, after a rather full discussion touching the elements of damage involved, the court concluded that its conscience would rest easy if it should suggest a remittitur of \$5,000. The memorandum continued: 'I believe if a remittitur of \$5,000.00 be entered I will overrule the motion for a new trial.'"

It is abundantly clear that the trial court in National Surety had found "malice, caprice or excitement" and for that reason ordered the remittitur. Appellant does not claim that the trial court in the case at bar made such a finding - nor does he claim that the trial court should or could have made such a finding.

Appellant quotes language from Brabham v. State of Mississippi, 5 Cir., 96 F. 2d 210, which does not explain why the court acted as it did. It is enlightening to read the language immediately preceding that quoted by appellant:

"We agree with appellants, too, that a new trial ought to have been granted instead of trying to ameliorate a verdict which the trial judge concluded was oppressive and amounted to an injustice. The resentment and revulsion of feeling against what the jury apparently regarded as acts of high-handed oppression on the part of a petty officer, and as callousness toward those acts implied in retaining him in office, evidenced by the highly punitive character of the verdict, while natural and reasonable enough in determining who should be selected as officers of a community, have no place in the jury room."

And, following the language quoted by appellant, is further explanation of the court's action in the premises:

"The District Judge felt as the jury did, and as we do, the outrageousness of Varnardo's conduct, if, as the jury evidently believed, the circumstances of the arrest were as plaintiff's evidence declared them to be. He regretted, as we do, that the jury in the course of considering the damages appropriate to be awarded was carried away by a sense of that outrage. He thought that a remittitur would restore to the verdict the cool justice that it lacked."

It is apparent that the Brabham case has no common ground with the case at bar - a not extraordinary personal injuries suit.

Again, in citing Fornwalt v. Reading Co., supra, appellant quotes language which fails to inform, and requires that additional language of the opinion be set forth. It is the trial court itself which is quoted as follows, at page 922:

"When the verdict was returned we advised counsel at side bar that we thought the amount of the verdict was excessive.* * * However, after a study of the briefs of counsel and an independent study of the authorities and, in the light thereof, a thorough consideration of the testimony, we are confirmed in our judgment that the verdict was grossly excessive, and that the cause should be submitted to another jury unless the plaintiff is willing to remit a part of the damages awarded."

Thus read, the Fornwalt case supports the trial judge's action in the case at bar. A fortiori, for the court in the former case made a finding that the verdict of the jury was "grossly excessive."

Another case cited by appellant, Ona v. Reachi (Cal., 1951) 105 C. A. 2d 758, 761, 233 P. 2d. 949, 951, supports the position of appellee, as will be seen from the following:

"Inasmuch as the symptoms indicative of plaintiff's condition were almost entirely subjective, the credibility of plaintiff and the soundness of the opinions of the experts presented which were exclusively for the triers of the facts, the jury in the first instance, and upon motion for a new trial the trial judge. These are not questions for a reviewing court. The trial judge was of the opinion that the verdict was contrary to the weight of the evidence. So believing, it was his duty to either reduce the damages as a condition to denying the motion or to grant a new trial."

Which was exactly what the trial judge did in the case at bar.

Appellant's allegation of passion and prejudice without offering any proof makes it worthwhile to discuss the necessity of some finding of such bias. In Schwer v. N. Y. C. & St. L. R. Co., 161 Ohio St. 15, 117 N. E. 2d 696, the lower court had specifically found that the excessive judgment was not due to passion or prejudice. In Chester Park Co.

v. Schulte, 120 Ohio St. 273, 166 N. E. 186, the court affirmed the use of a remittitur by the lower court and in its opinion referred to Spear & Co. v. Fulton, 92 Ohio St. 523, 112 N. E. 1086, in which a jury verdict was reduced with the consent of the plaintiff. The defendant appealed and argued that the trial court had said that the verdict had been reached based on passion and prejudice. The trial court did not make such a journal entry. The remittitur was upheld by the circuit court which affirmed the "doctrine that the situation is controlled by the Court finding or not finding as a fact that the jury was influenced by passion and prejudice." In the Chester Park opinion, the court also referred to Ohio Tractor Co. v. Shearer, 97 Ohio St. 332, 120 N. E. 878, and Capital City Dairy Co. v. Amicon, 99 Ohio St. 443, 126 N. E. 925, in both of which cases the lower courts ordered remittiturs on the ground of excessiveness but did not make findings that the juries were not influenced by passion and prejudice.

In the case at bar the failure of the trial court to make an express finding that the jury verdict was not influenced by passion and prejudice cannot be interpreted to mean that it was. The denial of appellant's motion settled that. For, as was stated in Bailey v. Interstate Automotive, supra:

"It is clear there is a vital distinction between mere excessiveness (or inadequacy) of an award, and such excessiveness (or inadequacy) as would indicate a verdict was the result of bias and prejudice; the former may be but an honest mistake of the jury, while the latter savors of misbehavior on the part of the jury."

Appellant failed to make that distinction successfully in his argument on the motion for a new trial. His brief now ignores it - though it is indeed "vital."

**III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION
IN PERMITTING COUNSEL FOR APPELLEE TO USE
THE BLACKBOARD DURING FINAL ARGUMENT.**

Appellant's request that the trial court deny to appellee the benefit of having his counsel use the aid of the blackboard during his final argument to the jury was properly refused by the trial court. Appellant cites the case of Warren Petroleum Corporation v. Pyeatt (Texas, 1955) 275 S. W. 2d 216, in support of his position that the trial court abused its discretion. There, plaintiff's counsel had displayed three charts, two of which dealt with matters of liability and the third with damages. That the court's objection went to their use as unsworn testimony rather than as argument is shown by the following, at page 218:

"Most of the statements in the first two charts are plain positive factual unsworn statements and were not put there during the argument on each point and not as a reasonable deduction from the evidence. The statements and figures in the third chart were not put there during the argument and as a reasonable deduction from the evidence. Oral argument, with proper references to the testimony and evidence that would reveal such factual statements made orally in argument without any reference to or inference from the evidence is error. An attorney cannot testify orally in his argument, and what he cannot do orally he certainly cannot do in writing."

A reading of the portion of the oral argument of counsel for appellee quoted by appellant shows that counsel for appellant interrupted when a reference was made to the value of "the summer job." Objection was made to "the summer school job." But, of course, appellee

had testified that he had had an opportunity for a personnel job in Portland, Maine, which paid \$1,000 for the summer (jt. app. 23) as well as the expected summer school at American University for \$1,000. (jt. app. 23) The trial court's comment on the interruption of appellant's counsel, "I think he said it would be a thousand dollars" makes the point that appellant's counsel was merely matching his recollection of the testimony with that of counsel for appellee - and at the expense of the latter's time for oral argument. The trial court properly observed, "That is my recollection; but the jury will recall." It was indeed a question of fact to be determined by the jury - an exercise of their unique function.

When appellee's counsel gave \$4,500 as the value of the academic year, appellant's counsel also did not recall that appellee had testified that the "year goes on for the summer school, until September." (jt. app. 36) The trial court reminded appellant's counsel that he could argue that point to the jury. Here again counsel was matching recollections instead of leaving it to the jury.

Appellant also complains that, after the above interruptions of his counsel, appellee's counsel made an error in addition in the very last minute granted by the trial court. It was immediately corrected by counsel for appellee upon it being called to his attention by appellant's counsel. Of course, it was the turn of appellant's counsel to argue and he could have corrected it, immediately - and effectively. Certainly, the jury was not misled.

Appellant complains not that the jury did not hear testimony regarding an \$80 suit and \$35 eye-glasses (jt. app. 28) and taxi fares (jt. app. 20) but only that counsel for appellee should not have referred to the same. In the next to the last sentence of his argument quoted by appellant, counsel for appellee told the jury that "you are free to give your own values to them." In his immediately following oral argument, counsel for appellant had the opportunity to point out to the

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jury that the testimony of value of the suit and eye-glasses did not allow for depreciation and that perhaps the free rides given by the good neighbor might have been included in the estimated total for taxi fares. Of course, the values given by appellee could be attacked; but appellant could not expect counsel for appellee to do it for him.

The rest of appellant's objection to the argument of appellee's counsel is found in his brief under the heading: "(b) Items displayed on the blackboard which did not result from the accident." This description of his contention invites the only answer: It was for the jury to decide what items resulted from the accident. And for the trial court to correct error in that decision - if any there were.

Reading the argument of appellee's counsel quoted by appellant and considering the testimony, in the light most favorable to appellee, it is clear that counsel for appellee stayed well within the limits of proper argument, as set forth in 53 Am. Jur.. (Trial):

" * * * It is now generally conceded that counsel properly may state his views thereon, and on the conclusions fairly deducible from the evidence in the case. Where there is some evidence before the Court from which facts stated by counsel in argument can be inferred, he is justified in making such inferences although the evidence by which they are sought to be maintained is not strong or clear."
(page 392)

" * * * likewise there is no objection to statement by counsel, in argument, as to what, under the evidence, he considers a fair compensation for injuries received."
(page 391)

Appellant alleges that the jury accepted the \$19,300 total given by counsel for appellee and, in passion and prejudice, gave said counsel a fee of \$5,700 but gave nothing to appellee for his pain and suffering.

A rather remarkable misdirection of passion and prejudice. And an untenable argument.

IV. THE TRIAL COURT DID NOT COERCE THE VERDICT WHEN IT OFFERED THE JURY AN ADDITIONAL HALF HOUR FOR DELIBERATION.

That appellant charges the trial court with coercion of the verdict is clear from the following from his Brief:

"3. Whether the trial court abused its discretion in denying appellant's motion for a new trial after the trial court, in the handling of the jury, instructed the jury that if it did not arrive at a verdict by 6:30 p. m. on Friday evening, the jury would have to report on the case at 10:00 a. m. on the next day, Saturday." (Statement of Questions Presented.)

"4. The trial court did not handle the jury properly in informing the jury that if a verdict was not arrived at by 6:30 p. m. Friday, November 30, 1956, the jury would have to report back on the case on Saturday, December 1, 1956." (Statement of Points.)

"5. The trial court did not handle the jury properly in instructing that it would have to return on the case on a Saturday morning, December 1, 1956." (Summary of Argument.)

The above is not an accurate report of what happened. A reading of the colloquy between the trial court and the foreman of the jury quoted by appellant shows that the jury had found appellant liable for damages but had not yet agreed on the amount of the award. Although it was only six o'clock p. m., the trial court expressed concern for the jurors' private obligations and stated that he was going to allow them

to separate until the following morning - unless there was a likelihood of reaching an agreement within a reasonably short time. The foreman stated that there was a possibility of agreeing with another half hour of deliberation. Appellant did not object to the offer or acceptance of this additional half hour. It was after the jury had retired that the trial court used the word "if".

The trial court did not "inform" or "instruct" the jury that "if" it did not return a verdict within a half hour it would have to report back the following morning. Rather, a reading of the colloquy indicates the trial court's concern for the jurors' personal convenience rather than any attempt at coercion. To assume, as appellant does, that the jurors would violate their oaths because of speculative slight interference with their leisure time, would be to make a travesty of the jury system. Further, appellant does not reveal the reasoning which led him to conclude that a hurried verdict must be a larger verdict. Of course, it was not a "hurried" verdict: the jury had been deliberating for almost three hours on a single personal injuries case.

The trial court's handling of the jury can be tested by the following statement of the general practice, in 53 Am. Jur. (Trial) 671:

"It is familiar practice for a court to recall a jury after they have been in deliberation for any length of time for the purpose of ascertaining what difficulties they have, and of making proper efforts to assist them in the solution of their difficulties. The time at which such recall shall be made, if at all, rests in the sound discretion of the trial court to inquire whether they are likely to reach a verdict at any early date, to urge a further consideration of the case in hope that an agreement may be reached, and to urge on the jurors an earnest effort to agree. In so doing, the court should emphasize in language readily understood that

it is not endeavoring to inject its own ideas into the minds of the jurors as to the verdict they should find, and further, that in nothing said does the court intend or mean that any juror should surrender his own free will and judgment. "

So, the trial court in the case at bar certainly did not abuse its discretion in recalling the jury and inquiring about the possibility of reaching a verdict after further deliberation.

How far from coercion was the trial court's handling of the jury in the case at bar is seen from the following comparison, from 53 Am. Jur. (Trial) 675:

"However, where the jurors are told that unless they return a verdict by a certain time, they will have to remain together for a specified time thereafter on account of the inability of the court to receive their verdict, but they are accorded the privilege of returning a sealed verdict in the event of an agreement, or where they are told that unless an agreement is reached by a specified time, at which the absence of the judge becomes necessary, they will be permitted to separate until Monday morning, a verdict returned within the time specified will not be regarded as coerced. "

That the trial court in the case at bar did not abuse its discretion in giving the jury another half hour to deliberate after the foreman had stated that it was worth trying, is supported by the following, from 53 Am. Jur. (Trial) 677:

"How long a jury is to be kept in deliberation is a matter resting within the sound judicial discretion of the trial judge. His action in keeping them confined for a reasonable

time, refusing to discharge them at their request, or sending them back for further deliberation, does not as a rule amount to coercion of the verdict. No specific period can be designated, nor can any absolute rule be laid down, to control the court's discretion. So long as a further argument and comparison of views may aid in bringing about a unanimous verdict, jurors may properly be kept together to continue such comparisons of views and statement of argument."

The correct interpretation of the trial court's handling of the jury in the case at bar is simply that the trial judge sacrificed his own convenience by remaining in his chambers another half hour in order to save the jurors the inconvenience of returning on Saturday morning.

CONCLUSION

It is settled law in this jurisdiction that the action of the trial court in granting or refusing a new trial is not reviewable unless there has been an abuse of discretion. Kenyon v. Youngman, 59 App. D. C. 300, 40 F. 2d 812; Capital Traction v. Sneed, 58 App. D. C. 141, 26 F. 2d 296. Appellant has failed to show that the trial court abused its discretion in denying his motion for a new trial on any of the grounds alleged.

Therefore, appellee respectfully requests this Court to affirm the order of the trial court.

Respectfully submitted,

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